(3)

No. 90-651



In The

# Supreme Court of the United States

October Term, 1990

MICHAEL E. PLUNKETT,

*Petitioner,*

LANE, KNORR & PLUNKETT, Architects and Planners; LANE, KNORR & PLUNKETT, Investment Company, a/k/a LKP Investment Company,

*Plaintiff,*

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, Receiver of First Interstate Bank of Alaska, FIRST INTERSTATE BANK CORPORATION; FIRST INTERSTATE BANK OF OREGON,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF IN OPPOSITION OF RESPONDENTS FIRST INTERSTATE BANK CORPORATION AND FIRST INTERSTATE BANK OF OREGON

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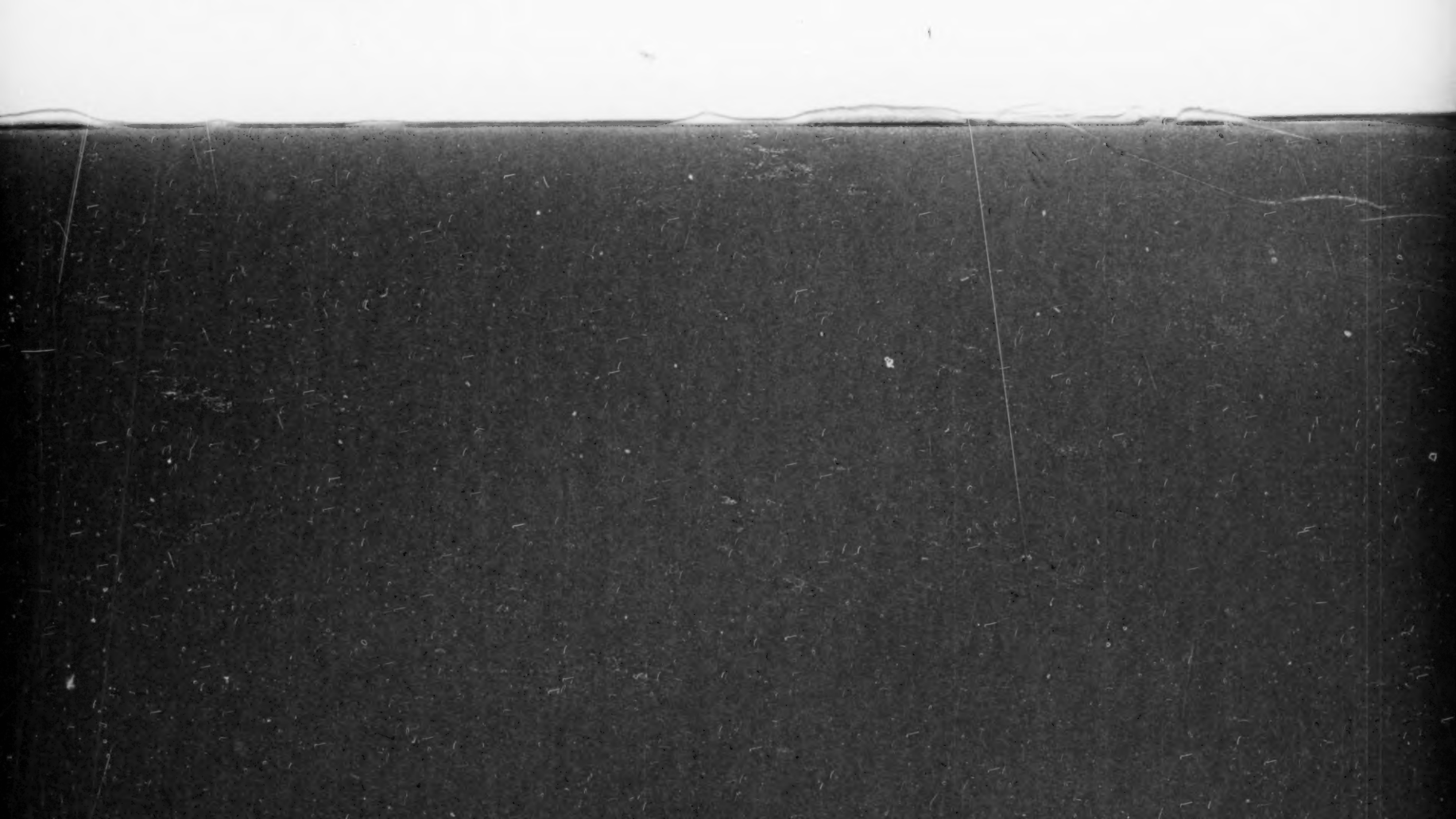

## QUESTIONS PRESENTED

1. Was petitioner denied due process of law or equal protection because he was not affirmatively advised by the district court of the level of proof he would be required to submit in order to successfully oppose a motion for summary judgment?

2. Did the Circuit Court of Appeals err in affirming a summary judgment dismissal of petitioner's claims?

## LIST OF PARTIES

1. *Michael E. Plunkett.* Petitioner Michael E. Plunkett is an architect who formerly lived in Anchorage, Alaska, and borrowed money from the Alaska Bank of Commerce.

2. *Alaska Bank of Commerce/First Interstate Bank of Alaska.* Alaska Bank of Commerce is the bank which made the loans which are the basis of petitioner's claims. In 1983, over a year after the last of the two loans was made to petitioner, Alaska Bank of Commerce entered into a franchise agreement with First Interstate Bancorp which permitted the Alaska Bank to use the name "First Interstate Bank of Alaska", to participate in the automatic teller system operated by First Interstate Bancorp, and to have access to certain operational services provided by the Bancorp. There was no parent/subsidiary relationship between the entities, and First Interstate Bancorp did not have an equity interest in First Interstate Bank of Alaska. (R. 88, ¶¶1, 2). Subsequent to the events at issue herein, First Interstate Bank of Alaska's operations were taken over in receivership by the Federal Deposit Insurance Corporation.

3. *First Interstate Bank of Oregon,* formerly First National Bank of Oregon, is a wholly-owned subsidiary of First Interstate Bancorp. Its subsidiaries are Equity Holding Company Limited, First Interstate Development Corp. and First Interstate Insurance Agency of Oregon, N.A.

4. *First Interstate Bancorp,*[1] respondent, is a bank holding company and is the parent corporation of First

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[1] Erroneously denominated "First Interstate Bank Corporation" in petitioner's complaint.

**LIST OF PARTIES – continued**

Interstate Bank of Oregon, formerly known as First National Bank of Oregon. (R. 87 ¶1). Other subsidiaries, and second-tier subsidiaries, are as follows:

- First Interstate Bank of Arizona, N.A.
  - First Interstate Insurance Company of Arizona
  - First Interstate Equity Corporation
  - TNR&S Acquisition, Inc.
- First Interstate Bank of California
  - First Interstate Bank International
  - United California Bank Realty Corporation
    - First Interstate Tower
    - UCB Leasing Corporation
  - First Interstate Overseas Investment, Inc.
    - First Interstate Asia, Ltd.
    - First Interstate Bank of Canada
    - First Interstate Administracao E Servicos, Ltd.
    - First Interstate & LCF Edmond De Rothschild-Gestion, S.A.
    - First Interstate International Trust Co. Ltd.
  - GFI Realty Co.
  - First Interstate Mortgage Company
  - First Interstate Southwest Corporation
  - Alex Brown Development
  - Meridian Mortgage Services
  - Pacific Equity Finance, Ltd.
    - Western Fruit S.A.
    - Western Agricola Limitada
    - Atlantic Produce Ltd.
    - Winter Fruit Distributors, Inc.

**LIST OF PARTIES – continued**

EZG Limited Partnership
First Interstate Bank of Englewood
First Interstate Bank of Fort Collins, N.A.
First Colorado Agricultural Credit Corporation
First Interstate Bank of Idaho, N.A.
First Interstate Bank of Nevada, N.A.
Hughes Parkway Associates
First Interstate Bank of Nevada Foundation
First Interstate Bank of Alberqueque
First Interstate Bank of Lea County
First Interstate Bank of Roswell
First Interstate Bank of Santa Fe, N.A.
First Interstate Bank of Utah, N.A.
First Interstate Insurance Agency of Utah, Inc.
First Interstate Bank of Washington, N.A.
TACSEA, Inc.
Evergreen Marine Leasing, Inc.
First Interstate Real Estate Services Company, Inc.
First Interstate Investment Services of Washington, Inc.
First Interstate Insurance Agency of Washington, Inc.
First Interstate Electronic Services Corporation
Lake Spokane Water Company
First Interstate Bank of Casper, N.A.
First Interstate Bank of Laramie, N.A.
First Interstate Bank of Riverton, N.A.
First Interstate Franchise Services, Inc.
First Interstate Bank of Oklahoma, N.A.
Consolidated Asset Management Company
First Interstate Foundation
First Investment Management Company
Bank Marketing Systems, Inc.

**LIST OF PARTIES – continued**

First Interstate Central Bank
First Interstate Bancorp of Texas, Inc.
- First Interstate Bank of Jacksonville
- First Interstate Bank of Texas, N.A.
  - First Interstate Capital Corp of Texas
  - First Interstate Capital Company of Texas
  - Idlewilde Company
  - Regency Utility Company
  - First Interstate Mortgage Company of the Southwest
- First Interstate Life Insurance Co. of Texas
- First Interstate Agency, Inc.
- First Interstate Foundation of Texas
- First Interstate Texas Leadership Funds/State
- First Interstate Texas Leadership Funds/Federal
- First Interstate Brokerage of Texas, Inc.
- Lakewood La Vista Company
- First Interstate Trust Co.

ISMA, Inc.
- First Interstate Mortgage Company of Colorado
- 1580 Logan Corporation
- First Interstate Structures, Inc.
- AJI Mortgage, Inc.
- DJS Mortgage Inc.
- First Interstate Commercial Corporation
- Hotel Vernal Corporation
- Cland 111 Corp.
- 1199 NASA Corp.
- Terrander II Corp.
- Postwood Plaza, Inc.
- First Energy Properties of Texas, Inc.
- Rivland Holding Corp.

**LIST OF PARTIES – continued**

First Interstate Asset Evaluation Services, Inc.
Cland I Corp.
Cland II Corp.
CMC Title Holding Corp.
Fimcopartners of Dallas, Inc.
FIMCO Partners of Denver, Inc.
Galvecurt Corp.
KATY Corporation
Kencherry Corp.
Richmond I Corp.
Wyoming Mine Corp.
First Interstate Overseas N.V.
First Interstate Bancard Company, N.A.
First Interstate Bancard Company
First Interstate Venture Capital Corporation
First Interstate Capital, Inc.
First Interstate Equities Corporation
First Interstate Resource Finance Associates
First Interstate International Finance Limited
First Interstate Trading Company
First Interstate Mortgage Company of Illinois
Republic Realty Mortgage Corporation
First Interstate Results, Inc.
First Interstate Bank, Ltd.
First Interstate Trust Company of New York
First Interstate Investment Services, Inc.
First Interstate Portfolio Lending Services, Inc.
FIL Holding Company
First Interstate Holding (UK) Limited
First Interstate Service Company (U.K.) Limited
First Interstate Servicios Financieros, S.A./6th Gen Sub/FICM Ltd/104

**LIST OF PARTIES – continued**

First Interstate Capital Markets, Ltd.
First Interstate Capital Markets Euroasia Limited/6th Gen
First Interstate Capital Markets Euroasia (H.K.) Limited/7th Gen Sub/105
First Interstate Nominees (HK) Limited
First Interstate Securities Limited
Highwalk Nominees Limited/ FICM Ltd./104/6th Gen. Sub
First Interstate Futures Corporation
First Interstate Public Finance Company
K.F.I. Developers, Inc.
Camarillo Commerce Center Joint Venture
First Interstate Financial Services, Inc. D/B/A Nova Financial Services
Nova Finance Services, Inc. Honolulu, Hawaii
First Interstate Bank of Alaska, N.A.
First Interstate Bancorp of Colorado
First Interstate Bank of Denver, N.A.
Denver Investment Advisors, Inc.
First Energy Properties, Inc.
Aspen Bancorp, Inc.
First Interstate Switch, Inc.
First Denver Asset Trust, Inc.
Farmers State Bank of Yuma
First Interstate Bank of Montana, N.A.

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**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF IN OPPOSITION OF RESPONDENTS FIRST INTERSTATE BANK CORPORATION AND FIRST INTERSTATE BANK OF OREGON

## RESPONDENTS' BRIEF IN OPPOSITION

Respondents First Interstate Bancorp and First Interstate Bank of Oregon respectfully request that this Court

deny the petition for writ of certiorari, which seeks review of Opinion No. 89-35500 of the United States Court of Appeals for the Ninth Circuit, filed May 16, 1990, which upheld the Final Judgment dated June 16, 1989 of the United States District Court for the District of Alaska.

Petitioner brought a petition for rehearing and suggestion for rehearing en banc, which was denied and rejected by the Court of Appeals by order dated July 18, 1990, from which petitioner brought his petition for writ of certiorari to this Court based upon 28 U.S.C. §1254(1).

## CONSTITUTIONAL PROVISION

Section 1 of the Fourteenth Amendment to the United States Constitution states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

### I. STATEMENT OF FACTS

Petitioner's claims arise from two loans made in Alaska to petitioner and his partnership by the Alaska

Bank of Commerce in 1981 and 1982. The first loan, in the amount of $1.667 million, was evidenced by a standardized Alaska Bank of Commerce note stating that it bore interest in an amount "not less than the prime rate plus ___ percent", with the prime rate defined as " . . . the prime rate being charged by the _____ to its most credit-worthy borrowers during the term of this note." (App. J-4-5.)[1] For this loan, the blanks were filled in to provide for a 3.5% increase above the prime rate, and "FIRST NATIONAL BANK OF OREGON, PORTLAND, OREGON" was inserted as the bank whose prime rate was referenced in the note. The second note, on a different standardized form, was executed on February 11, 1982, with blanks filled in to provide for interest at the rate of 3.5% "over Prime Floating of FIBO". (App. J-5.)

Petitioner's primary contentions below were that (1) the prime rate of the First National Bank of Oregon, later known as the First Interstate Bank of Oregon ("FIBO"), was fixed in violation of the Sherman Act, 15 U.S.C. §1, which resulted in interest overcharges to him, and that (2) the announced prime rate of FIBO, which the Alaska Bank used as an index to price the loans to appellant, was in fact not its real "prime rate" because FIBO sometimes made loans, to special borrowers, below the published prime rate. Petitioner's factual allegations supporting these points also formed the basis for a number of separate claims for relief on theories of state and federal antitrust violations, fraud, RICO (18 U.S.C. §1961 *et seq.)* and breach of contract. Additionally, petitioner alleged a

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[1] This designation is to page numbers in the Appendix filed herewith.

variety of claims arising under Alaska law, including usury, defamation, bank code violations, consumer protection law violations, and general allegations of a conspiracy designed to deny him credit and ruin his business.

Petitioner's claims referenced and relied upon claims brought in the United States District Court for the District of Oregon in *Wilcox Development Co. v. First Interstate Bank of Oregon, N.A.*, Civil Case No. 82-754, wherein other plaintiffs claimed that FIBO's adherence to a near universal prime rate constituted illegal price fixing, and that FIBO had misrepresented the "prime rate" in that it had sometimes advanced loans at below prime, to special borrowers. Subsequent to petitioner Plunkett's initial complaint herein, FIBO's actions were held, by the District Court of Oregon, not to violate the antitrust statutes, in *Wilcox Development Co. v. First Interstate Bank of Oregon, N.A.*, 605 F.Supp. 592 (D.C. Or. 1985), which holding was sustained on appeal in *Wilcox v. First Interstate Bank of Oregon, N.A.*, 815 F.2d 522 (9th Cir. 1987).

Petitioner had relied heavily upon the *Wilcox* facts to support his claims, and, in any case, was unable to offer evidence below to demonstrate any connection whatever between First Interstate Bancorp ("FIBC") or FIBO and the loans made by the Alaska Bank of Commerce to him or his company. The evidence was undisputed (1) that at the time the loans were made to petitioner there was no franchise agreement between FIBC and Alaska Bank of Commerce; (2) that neither FIBC nor FIBO had ever had any equity interest in Alaska Bank of Commerce; (3) that neither bank participated in nor had any knowledge of the loans to petitioner, or any other dealings with him; (4)

that FIBC acquired no interest in the loans by virtue of its subsequent franchise agreement with First Interstate Bank of Alaska (formerly Alaska Bank of Commerce); (5) that FIBO neither specifically authorized nor was aware of the fact that the loans to appellant had been tied to the prime rate of First National Bank of Oregon or FIBO, except for general knowledge that such was a common banking practice; and (6) that FIBO had never held out to petitioner, or to the public generally, that the announced "prime rate" was the lowest rate available to any borrower under any circumstances, and that the term "prime rate" does not carry with it such a connotation. (*See*, generally, App. F, G, H, K.)

The only evidence offered by petitioner to support any nexus between FIBC or FIBO and the loans made by the Alaska Bank of Commerce, or of any conspiracy between such banks, was as follows:

A. *The Alaska Bank of Commerce had referenced FIBO's prime rate in the loans to petitioner.* However, it was undisputed that neither FIBC nor FIBO had participated in the loans, or gained any interest in them at any stage. The Alaska bank unilaterally referenced the Oregon bank's prime rate as an index for the loans it made to petitioner, without direct or specific knowledge of the Oregon bank, and was a common banking practice. (App. G-2-3; App. J-3.) The Alaska bank normally referenced the Oregon bank's prime rate, in case the Oregon bank were to participate in interim commercial financing loans, which it frequently did, but did not do on this loan. (App. J-3; App. G-2-3; App. H-3.)

B. *FIBO had a correspondent bank arrangement with the Alaska Bank of Commerce.* This meant only that the Alaska bank had a short-term line of credit with FIBO, which permitted it to borrow on an overnight basis at the federal fund rate (no relationship to the "prime rate" on long-term loans) to meet immediate liquidity problems. This is a common relationship in the banking industry; FIBO corresponds with 39 different non-affiliated banks. (App. K-2-3.)

C. *The Alaska Bank of Commerce entered into a franchise agreement with FIBC, and changed its name to First Interstate Bank of Alaska.* This occurred in 1983, almost three years after petitioner's loan agreement with the Alaska bank and over a year after the last of the two loans was made. The franchise arrangement did not result in FIBC obtaining either any equity interest in the Alaska bank or any control of the lending activities of the Alaska bank or its employees. (App. H-2-3.) Petitioner's only evidence of any control was his assertion that, at the time the franchise agreement was executed in 1983, an FIBC representative advised the Alaska bank on the layout, signage, and other features FIBC desired at the bank. (App. I-7.)

D. *FIBC employed an individual named Kenneth K. Kaufmann, and the First Interstate Bank of Alaska had employed an individual named Frank Kaufmann.* These gentlemen are not related and not acquainted with one another. (App. L-2.)

E. *An individual named Robert McWhorter, who had previously worked for the FIBO branch in Eugene, Oregon, subsequently worked for the Alaska bank which had made the*

*loans to petitioner.* However, the record shows that McWhorter had been fired by FIBO and had engaged in acrimonious litigation with that bank for several years, before he went to work for the Alaska bank. (App. M-2-16.)

F. *Petitioner claims he made several telephone calls to FIBO to verify the correctness of the rate of interest being charged to him by the Alaska bank, and was advised by FIBO of its current prime rate.* The bank does not deny that it regularly responds to such inquiries from the public.

G. *At the time of pending foreclosure on the Alaska Bank of Commerce loans, petitioner attempted to obtain credit from other Alaskan banks, but was denied.* Petitioner offered no evidence of any communication between FIBC or FIBO and such banks, and FIBC and FIBO both deny any knowledge of petitioner or of his efforts to obtain credit, prior to the time he filed his suit in 1984. (App. G-3-4; App. H-4-5.)

## II. STATEMENT OF PROCEEDINGS

Petitioner filed this action *pro se* in 1984, and amended his complaint in December, 1987. Defendants FIBC and FIBO brought a motion for summary judgment on March 31, 1988. Four months after opposition and reply memoranda had been filed, the District Court held a status conference, at which time petitioner was provided with additional time to pursue "such discovery as he deems necessary for purposes of the defendants' summary judgment motion", and was granted leave to file a supplemental opposition following such discovery. (App.

D-1-2.) Thereafter, petitioner pursued no further discovery from either FIBC or FIBO; he did pursue discovery from FDIC; and he filed no additional opposition memoranda to respondents' pending motion for summary judgment.

After hearing, the District Court entered summary judgment on May 15, 1989 (App. B-1) and final judgment on June 16, 1989 (App. C.) On the price fixing claim, the District Court held that *Wilcox v. First Interstate Bank of Oregon, N.A.*, 815 F.2d 522 (9th Cir. 1987), which addressed the identical banking practices of FIBO which were the subject of petitioner's allegations, was dispositive that the Bank's method of establishing its prime rate did not constitute illegal price fixing, unless petitioner could supply the Court with any additional facts which would evidence any suppression of competition or show any sinister domination. (App. B-4.) The Court held that petitioner had not sustained his burden of coming forward with sufficient evidence to withstand a summary judgment motion, under the standards set forth in *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986); and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). (App. B-3-6.) Additionally, the District Court held that the evidence proffered by plaintiff failed to meet his burden to produce evidence that is capable of sustaining a rational inference of conspiracy and that tends to exclude the possibility that FIBC and FIBO had acted independently of the alleged co-conspirators, and thus lawfully. (App. B-5.) The Court held that petitioner's remaining claims for relief all hinged on the allegation of conspiracy, and that petitioner had failed to make any showing whatever

that FIBC or FIBO conspired with any other person or entity in a way relating to plaintiff's loans. (App. B-7.)

Petitioner appealed to the Ninth Circuit Court of Appeals, supplementing his previous arguments with the contention that *Celotex, Anderson,* and *Matsushita* set forth a new summary judgment standard and that he, as a *pro se* civil litigant, was entitled to prior notice of this standard by the District Court, prior to the entry of summary judgment dismissing his claims. Additionally, petitioner argued that his pendent state claims should not have been dismissed with prejudice, but rather left open for resolution by state courts.

The Court of Appeals affirmed the dismissal of all claims by Memorandum Decision dated May 16, 1990, citing its earlier holding, in *Wilcox v. First Interstate Bank of Oregon*, 815 F.2d 522 (9th Cir. 1987), that a bank does not violate the Sherman Act simply by pegging its interest rate to the interest rates of other banks, and pointing out that petitioner herein had failed to supply any evidence to show that the Alaska bank's practice of pegging its rate to that of FIBO was anything but a legitimate business practice. (App. A-4-5.) Moreover, it held that petitioner had supplied no evidence from which a trier of fact might reasonably conclude that FIBO or FIBC was liable for misrepresentation to petitioner, with whom these banks had no business relationship whatever. (App. A-5.) Because the District Court, in its summary judgment deliberation, had weighed both state and federal claims relying upon the allegation of conspiracy, the Court of Appeals held that it was a proper exercise of the District Court's discretion to render summary judgment on all claims, including the state claims. (App. A-5.)

Petitioner sought rehearing, which was denied by Order dated July 18, 1990, from which his Petition for Writ of Certiorari was brought.

## SUMMARY OF ARGUMENT

Petitioner failed to supply any plausible evidence that FIBC or FIBO conspired to fix prices; that the Alaska bank's pegging of its rate to that of respondent banks was anything but a legitimate, unilateral business practice; or that, indeed, FIBC or FIBO had any knowledge of or connection whatever with petitioner's financial arrangement with his Alaskan bank. Petitioner's central contention, that as a *pro se* litigant, he was entitled to explicit prior notice by the trial court as to his evidentiary burden in opposing a summary judgment motion, is unsupported by precedent in this Court or in any of the circuits. Even if it is assumed that district courts have a duty to affirmatively apprise *pro se* civil litigants of the necessity for filing affidavits in opposition to a properly supported motion for summary judgment, the courts should not be tasked with the duty of explaining in detail the standards for adjudicating such motions, or with specifying the quantity and quality of evidence necessary to sustain a litigant's burden. Such a requirement would inject the trial court into the adversary process, erode the appearance of impartiality, and unfairly discriminate against parties represented by counsel. To hold a civil litigant who chooses to represent himself to the rules of civil procedure does not constitute a denial of due process or equal protection, and the petition should be denied.

## REASONS WHY THE PETITION SHOULD BE DENIED

Petitioner has failed to demonstrate that the ruling of the Ninth Circuit Court of Appeals is in conflict with the decisions of other circuits regarding the rights of a *pro se* civil litigant. He has also failed to demonstrate that the Court of Appeals departed from the accepted and usual course of judicial proceedings in sustaining a dismissal of both federal and pendent state claims, where the petitioner had failed to supply any probative evidence which could reasonably support such claims.

### I. A *PRO SE* CIVIL LITIGANT IS NOT ENTITLED TO PRIOR ADVICE BY THE COURT AS TO THE PRECISE QUANTUM OF PROOF REQUIRED TO AVOID A SUMMARY JUDGMENT DISMISSAL.

Petitioner has argued that this Court's recent pronouncements regarding the burden of proof of a party opposing summary judgment under FRCP 56 resulted in a change in the Rule from that which existed when he filed his complaint in 1984. Based upon this assertion, he contends that when a motion for summary judgment has been brought against a *pro se* civil litigant such as himself, the trial court must affirmatively advise him not only of the need to file an affidavit in opposition,[2] but also as to

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[2] Respondents do not herein contest the obligation to provide such notice, which, as discussed in the following section, has been recognized by some of the circuit courts. Petitioner Plunkett was fully aware of his obligation to file affidavits to oppose a motion for summary judgment, and in fact did so. *Cf.*, App. I, J.

the precise standard for determining whether such evidence is sufficient to prevent summary judgment. Petitioner contends that the Ninth Circuit's decision in *Jacobsen v. Filler*, 790 F.2d 1362 (9th Cir. 1986) as to the rights of *pro se*, non-prisoner litigants is at odds with decisions in other circuits, and therefore requires this Court's attention. Assuming the *Jacobsen* decision is different from that of other circuits, such difference is not presented by the issues in this petition. The type of notice demanded by petitioner has not been required by any federal court, nor should it be imposed.

A. *The Standard for Granting Summary Judgment has not Changed in Any Manner which would Affect the Outcome as to Petitioner's Claims.*

Petitioner's brief focuses upon a case relied upon by both the District and Circuit Court below, *California Architectural Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987), which set forth the burden of a party opposing summary judgment, based upon this Court's recent decisions in *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986); and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). These decisions make clear that, when a conspiracy has been alleged, where defendant has produced affidavits denying that it acted or intended to act in furtherance of a conspiracy, and where defendant has demonstrated that the specific acts identified by the plaintiff were in fact lawful actions in pursuit of legitimate business ends consistent with permissible competition, the burden is upon the non-moving party to

establish a genuine dispute of fact. To show a "genuine" factual issue that may be resolved only by a finder of fact, the plaintiff must show that such issues may reasonably be resolved in favor of either party; if the factual context makes the plaintiff's claim implausible, the plaintiff must come forward with more persuasive evidence to show that there is a genuine issue for trial. Petitioner argues that this standard, and this Court's recent pronouncements on the standards of Rule 56, constituted such a change in the burden to be met by a party opposing summary judgment as to require explicit notice thereof to a *pro se* litigant.

FRCP 56(e), however, has long provided that, when a motion for summary judgment is made and supported with affidavits, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but must supply affidavits or other evidence showing that there is a "genuine issue" for trial. The amount or quality of evidence necessary to produce a "genuine" issue has always been a complicated question of fact and law, suffering from misuse by lawyers and courts alike. *See* generally, Schwarzer, Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact, 99 FRD 465, 467 (1984). As the foregoing article points out, however, Rule 56(e), since its amendment in 1963, has required the party opposing summary judgment to "set forth specific facts" showing a genuine issue, with the effect that

> . . . the opposing party must rebut the moving party's showing with evidence which would preclude a directed verdict or judgment n.o.v. for the moving party.

Schwarzer, 99 FRD 465 at 482. *Celotex*, *Anderson*, and *Matsushita* did not change this standard; these cases restated and clarified the opponent's burden, to resolve confusion and insure uniformity in the federal courts. The opponent's evidentiary burden has long been one to produce sufficient evidence to resist a directed verdict and to require submission to the trier of fact. In *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968), wherein the petitioner had alleged conspiracy and violation of antitrust laws, the Court held that respondent oil company's refusal to deal with petitioner did not itself create a genuine issue of fact, and that the burden was not on the respondent to demonstrate the absence of a genuine issue. The Court held that Rule 56(e) requires

> . . . that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial.

The Court went on to hold that the plaintiff could not proceed to a jury trial without " . . . any significant probative evidence tending to support the complaint." *Id.* at 290, 20 L.Ed.2d 569, 88 S.Ct. 1575. *Cities Service*, which was relied upon in *Anderson*, 477 U.S. 242 at 248-9, preceded petitioner's 1984 complaint herein.

Prior to petitioner's complaint, numerous decisions in the Ninth Circuit also clearly stated the requirement that the party opposing summary judgment must produce sufficient evidence as to permit reasonable persons to disagree on the outcome of the issue. Relying heavily upon Ninth Circuit precedent, Judge Schwarzer's 1984 article stated that the usual issue

> . . . is whether the proponent of an inference comes forward with sufficient evidence to sustain a judgment in his favor. The test of sufficiency is whether, on the evidence, a jury verdict would be sustained. If the evidence would compel a directed verdict or judgment n.o.v. against the opponent of the motion, there is no genuine issue and the motion must be granted.

Schwarzer, 99 F.R.D. 465 at 481. In fact, several Ninth Circuit decisions, prior to petitioner's complaint, dismissed antitrust conspiracy claims because of the failure of the plaintiff's evidence to rise to the level necessary to support a verdict. *See, Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 901-03 (9th Cir. 1983); *Betaseed, Inc. v. U & I, Inc.*, 681 F.2d 1203, 1207 (9th Cir. 1982); *Mutual Fund Investors v. Putnam Management Co.*, 553 F.2d 620, 624-5 (9th Cir. 1977); and *California Shipping Co., Inc. v. Pacific Far East Line, Inc.*, 453 F.2d 380, 381 (9th Cir. 1971).

As discussed in the following section, petitioner has failed to come forward with any significant probative evidence to support a theory of conspiracy or his other theories. Assuming, *arguendo*, that his affidavits create some relevant factual issue, he has created no "genuine" issue by proffering facts sufficient to submit the issue to a jury. Summary judgment would have been proper under the standard applied in *Cities Service* and in the Ninth Circuit precedent existing at the time he filed his complaint. Dismissal of petitioner's claims herein was not dependent upon this Court's recent clarification and reiteration of a party's burden to oppose summary judgment under FRCP 56(e).

B. *A Pro Se Litigant is Not Entitled to Prior Judicial Explanation of Standards for Granting Summary Judgment.*

Even if *Celotex, Anderson,* and *Matsushita* constituted a new and different interpretation of a party's burden in opposing summary judgment, this does not entitle a *pro se* litigant to some special notice not afforded to other litigants. While this Court has held *pro se* litigants, particularly those who are prisoners, to less stringent requirements in complaint pleading than it would a party represented by counsel (*see Haines v. Kerner*, 404 U.S. 519, 520-21, 30 L.Ed.2d 652, 92 S.Ct. 594 (1972); *Boag v. MacDougall*, 454 U.S. 364, 365, 70 L.Ed.2d 551, 102 S.Ct. 700 (1982)), it has also warned *pro se* litigants that they will be accorded neither special treatment nor leniency. *Faretta v. California*, 422 U.S. 806, 835, n. 46, 45 L.Ed.2d 562, 95 S.Ct. 2525 (1975) (rejected notion that right of self-representation was "a license not to comply with relevant rules of procedural and substantive law.")

Nevertheless, several circuit courts have recognized that a *pro se* litigant is entitled to notice of the consequences of failure to submit affidavits in response to a motion for summary judgment. *Jaxon v. Circle K Corp.*, 773 F.2d 1138 (10th Cir. 1985); *Garaux v. Pulley*, 739 F.2d 437 (9th Cir. 1984); *Lewis v. Faulkner*, 689 F.2d 100 (7th Cir. 1982); *Hudson v. Hardy*, 412 F.2d 1091 (D.C. Cir. 1968); and *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975). With the exception of *Jaxon*, these were all civil cases brought by *pro se* prisoners.

Unlike the Tenth Circuit in *Jaxon*, the Ninth Circuit declined to extend to non-prisoner *pro se* litigants the right to prior notice from the Court as to their need to file

affidavits in opposition to a motion for summary judgment. *Jacobsen v. Filler*, 790 F.2d 1362, 1364-6 (9th Cir. 1986). *Jacobsen* and *Jaxon*, however, do not present a conflict in the circuits which is highlighted by the case at bar. None of the circuits, nor any other courts, have ever held that a *pro se* litigant, prisoner or non-prisoner, is entitled to the level of assistance from the Court demanded by petitioner herein. Courts recognizing the right of a *pro se* litigant to notice of the bare procedural requirement that an affidavit be filed have done so in the face of a very real possibility of a miscarriage of justice. Such courts have declined to dismiss what may be a valid claim simply because of the *pro se* litigant's ignorance of the rudimentary Rule 56 requirement that he must, though at a stage prior to trial, put his evidence into affidavit form.

In *Jaxon*, the *pro se* plaintiff in a civil rights action opposed summary judgment with a substantial collection of material[3] which, in the appellate court's view, would

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[3] Jaxon's opposition to summary judgment attached EEO-1 Employer Information Reports submitted by defendant which raised an inference of discrimination against blacks; it contained Jaxon's unsworn reiteration of specific racial statements made to him by defendant's area director; it attached a decision of a state agency, after a hearing, that defendant employer had no intention to comply with an EEOC settlement agreement pertaining to Jaxon; and it attached unverified statements taken by the EEOC which tended to undermine the credibility of defendant's summary judgment affidavits. *Jaxon*, 733 F.2d 1138 at 1139-40. By contrast, petitioner herein has made no showing of what additional evidence he could now muster to support his claims, now that he understands the extent of his burden to produce such evidence. The record shows that he had been given ample opportunity, prior to hearing, to pursue discovery from FIBC and FIBO in order to support his opposition to summary judgment, but declined to do so.

have required denial of the motion if it were put into the form of sworn evidence as required by the rules. 773 F.2d 1138 at 1139-40. However, neither *Jaxon* nor any other case has suggested that a *pro se* litigant is entitled to be given any judicial advice or notice beyond the mere procedural requirement of filing an affidavit.

Petitioner Plunkett needed no advice from the trial courts as to the rudimentary requirements of opposing summary judgment; indeed, his petition to this Court demonstrates his capability of reading, understanding and following Court procedural rules. Petitioner contends, however that he should have been given additional advice from the court as to the precise character or quantum of evidence he needed to produce to avoid summary judgment. This would, of necessity, require the court to first review the moving party's affidavits and the law applicable to the case, for without this context, intelligent advice or notice as to the opposing party's evidentiary burden may not be given. This would invite an open-ended participation by the Court in the *pro se* litigant's presentation of his opposition to summary judgment. The appearance of judge as advocate would be unfair to other litigants and damaging to the appearance of impartiality upon which acceptance of judicial decisions is based. Moreover, prior judicial advice as to a party's precise burden in opposing summary judgment may well spawn further litigation as to the correctness of such advice. Unless a *pro se* litigant is advised of all the nuances of the judicial gloss placed upon the summary judgment rule by the latest appellate decisions, he may claim a denial of due process, if due process is held to require the type of notice sought herein by petitioner.

FRCP 56(e) afforded petitioner with notice of his obligation to present sufficient facts to create a "genuine issue". If it was necessary for him to consult a professional to determine the precise meaning of this requirement, in the context of his claims and the facts presented in opposition to his claims, his remedy was to seek assistance from an attorney, not the trial court. As stated in *United States v. Pinkey*, 548 F.2d 305, 311 (10th Cir. 1977),

> The hazards which beset a layman when he seeks to represent himself are obvious. He who proceeds *pro se* with full knowledge and understanding of the risks does so with no greater rights than a litigant represented by a lawyer, and the trial court is under no obligation to become an "advocate" for or to assist and guide the *pro se* layman through the trial thicket.

## II. SUMMARY JUDGMENT DISMISSAL OF PETITIONER'S CLAIMS WAS APPROPRIATE

The Court of Appeals acted correctly in sustaining a dismissal of Plunkett's claims when he was unable to supply any probative evidence to distinguish his case from *Wilcox v. First Interstate Bank of Oregon, N.A.*, 815 F.2d 522 (9th Cir. 1987), or to otherwise demonstrate that respondents FIBC and FIBO had conspired with the Alaska bank or had any knowledge or connection whatever with the loans made to petitioner.

*Wilcox* properly held that FIBO's practice of changing its prime rate whenever any four of seven specific banks changed theirs is not in itself violative of the Sherman Act, 15 U.S.C. §1, in that a competitor's practice of independently, as a matter of business judgment, following

the prices of an industry leader " . . . does not establish any suppression of competition or show any sinister domination." *Wilcox*, 815 F.2d 522 at 526, quoting from the opinion in *United States v. International Harvester Co.*, 274 U.S. 693, 708-09, 71 L.Ed. 1302, 47 S.Ct. 748 (1927). After full analysis of FIBO's unilateral actions in setting its prime rates, the *Wilcox* court concluded that such practices

> . . . Are motivated by legal, non-collusive business practices. Near uniformity in prime interest rates reflects a competitive market for funds. Prime rates will arguably be nearly identical when each bank pursues its individual self-interest because failure to follow national prime rates could cause either losses or severe liquidity problems.

*Wilcox*, 815 F.2d 522 at 528. It was therefore incumbent upon petitioner herein to produce additional probative evidence, distinguishing *Wilcox* and demonstrating unlawful concerted activity or intention to suppress competition or monopolize. Petitioner produced no such evidence.

Moreover, petitioner failed to sustain his burden of showing any nexus whatever between FIBC or FIBO and the loans made to petitioner by the Alaska bank. The circumstantial evidence presented by petitioner simply fails to meet the burden established by this Court in conspiracy cases, in that it does not create an inference of conspiracy which is more probable than an inference of independent action. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 at 280.

The evidence at summary judgment showed that the Alaska bank unilaterally referenced the Oregon bank's prime rate, for purposes of convenience; that neither FIBC nor FIBO had any ownership interest in the Alaska bank or participated in the subject loans, nor had any knowledge as to them; that the subsequent franchise arrangement between FIBC and the Alaska bank had no bearing upon the subject loans; that coincidences in last names of bank employees, and the hiring by the Alaska bank of a fired FIBO employee, were not in furtherance of any conspiracy; and that neither FIBC nor FIBO played any role in denial of credit to petitioner by other Alaska banks. On the basis of such evidence, this Court should continue the policy set forth in *First National Bank v. Cities Service Co.*, 391 U.S. 253 at 290:

> While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dressed trial notwithstanding the absence of any significant probative evidence tending to support the complaint.

Because all of petitioner's remaining federal and state claims relied upon some showing of connection between FIBC or FIBO and the loans made to petitioner, the court of appeals properly sustained dismissal because petitioner failed to produce any such evidence. Additionally, with regard to his RICO and fraud claims, petitioner failed to produce any evidence that FIBO had represented to any party, must less petitioner, that its prime rate was the lowest rate charged to any customer under any circumstance, and dismissal was warranted.

The District Court below properly exercised its discretion in dismissing with prejudice both the federal claims and the pendent state claims. The Court was presented with the parties' affidavits and arguments regarding the viability of all claims, and the Court evaluated both the federal and state claims in its review of the summary judgment issues. Where the Court and the litigants expend considerable time on pendent claims before antitrust claims are dismissed, it is proper for the Court to retain jurisdiction and decide the state claims. *Arizona v. Cook Paint & Varnish Co.*, 541 F.2d 226, 227-28 (9th Cir. 1976) (*per curiam*), *cert. denied*, 430 U.S. 915, 97 S.Ct. 1327, 51 L.Ed.2d 593 (1977). Where, as in the case at bar, evidence and argument on the pendent claims are presented simultaneously for decision by the court, and the court concludes that the pendent claims have not been supported, they should be dismissed with prejudice, rather than relitigated in state court; such procedure furthers the interests of judicial economy, convenience, and fairness to litigants, which are the recognized purposes of the discretionary exercise of pendent jurisdiction. *See, United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966).

## CONCLUSION

A *pro se* civil litigant is not denied due process or equal protection because he is not provided special judicial notice of his precise burden of proof in opposing summary judgment. A contrary rule would draw the trial courts into the adversary process and would discriminate against parties who are represented by counsel. Petitioner failed to present any concrete evidence to support his claim of conspiracy or his other claims, and dismissal was proper.

Respectfully submitted,

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## APPENDIX A

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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|---|---|
| MICHAEL E. PLUNKETT,<br>Plaintiff-Appellant,<br>and<br>LANE, KNORR & PLUNKETT, ARCHITECTS AND PLANNERS; LANE, KNORR & PLUNKETT INVESTMENT COMPANY, a/k/a LKP Investment Company,<br>Plaintiffs-Appellants,<br>vs.<br>FEDERAL DEPOSIT INSURANCE CORPORATION, Receiver of First Interstate Bank of Alaska; FIRST INTERSTATE BANK CORPORATION; FIRST INTERSTATE BANK OF OREGON,<br>Defendants-Appellees. | No. 89-35500<br>D.C. No. CV-84-387-HRH<br>MEMORANDUM*<br>(Filed May 16, 1990) |

Appeal from the United States District Court
for the District of Alaska
H. Russel Holland, District Judge, Presiding

Submitted: May 11, 1990 **
Seattle, Washington

Before: FARRIS, PREGERSON, and FERGUSON, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); Circuit Rule 34-4.

Michael E. Plunkett, a pro se plaintiff and appellant, appeals summary judgment against him. Plunkett's suit pertains to circumstances surrounding two commercial loans he obtained from the Alaska Bank of Commerce (ABC) in 1981 and 1982. Plunkett was given a rate of interest by ABC pegged to the prime rate offered by the First National Bank of Oregon (FNBO) to FNBO's most creditworthy borrowers. FNBO, subsequently renamed First Interstate Bank of Oregon (FIBO), has been at all relevant times a wholly-owned subsidiary of First Interstate Bank Corporation (FIBC). In 1983, ABC entered into a franchise agreement with FIBC and was renamed First Interstate Bank of Alaska (FIBA) (now in receivership and represented as an appellee by the Federal Deposit Insurance Corporation).

Plunkett argues that FIBA, FIBO, and FIBC conspired with other, unnamed entities to fix the rate of interest offered to commercial borrowers, causing Plunkett to pay illegally inflated rates on his loans. He further contends that FIBO's definition of "prime rate" was intended to induce the false belief among its borrowers that the prime rate was the lowest rate FIBO offered, and that the FIBA reference to that rate on his loan instruments manifested a conspiracy between the two banks (and the Oregon bank's parent, FIBC) to deceive him. These contentions formed the basis for Plunkett's federal claims under section one of the Sherman Act, 15 U.S.C. § 1, and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961, 1962, and his pendent Alaska claims (statutory, breach of contract, fraud, civil conspiracy, interference with contract, interference with prospective economic advantage, intentional infliction of

emotional distress, and an assortment of so-called "prima facie torts of various descriptions," including "gross negligence, recklessness, . . . wrongful foreclosure, usury, tortious breach of contract and others."

The district court granted summary judgment for FIBA, FIBO, and FIBC on the ground that Plunkett presented no credible evidence that the banks engaged in any actionable conduct. As a matter of law, the court held, no trier of fact could find for Plunkett.

## STANDARD OF REVIEW

A grant of summary judgment is reviewed de novo. *Kruso v. International Telephone & Telegraph Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989); *State Farm Fire and Casualty Co. v. Martin*, 872 F. 2d 319, 320 (9th Cir. 1989). The appellate court's review is governed by the same standard used by the trial court under Fed. R. Civ. P. 56(c). *Darring v. Kincheloe*, 783 F.2d 874, 876 (9th Cir. 1989). The appellate court must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Tzung v. State Farm Fire and Casualty Co.*, 873 F.2d 1338, 1339-40 (9th Cir. 1989); *Judie v. Hamilton*, 872 F. 2d. 919, 920 (9th Cir. 1989).

## DISCUSSION

Plunkett insists that he established a prima facie case and is entitled to try it. First, he points to another case, *Wilcox Dev. Co. v. First Interstate Bank of Oregon*, 605

F.Supp 592 (D.Or.1985), where a jury returned a verdict against FIBO on a Sherman Act claim. Second, he appears to rely on another part of that case in its appellate incarnation, *Wilcox v. First Interstate Bank of Oregon*, 815 F.2d 522 (9th Cir. 1987), where summary judgment for defendant on a RICO claim was reversed and remanded. It was alleged in the *Wilcox* plaintiffs' RICO claim that FIBO made false representations about its prime rate being the lowest rate given to creditworthy borrowers. Plunkett apparently infers that the issue of whether FIBO misrepresented its interest rate is therefore triable here. Third, Plunkett asserts that FIBO actually participated in loans granted by FIBA during the period of Plunkett's loans, and argues that that participation constitutes evidence of rate-fixing activity and collusion by the banks in the fraud associated with FIBA's use of FIBO's prime rate as a reference for its own loans. Finally, Plunkett argues that a former loan officer at FIBO was subsequently employed in the same capacity by FIBA, further linking the activities of the defendants with respect to rate-fixing and FIBO's misrepresentation of its prime rate.

The district court correctly ruled that Plunkett's facts cannot withstand a summary judgment motion under Fed. R. Civ. P. 56(c), as construed by *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *California Architectural Building Products v. Franciscan Ceramics*, 818 F.2d 1466 (9th Cir. 1987), *cert. denied*, 484 U.S. 1006 (1988), and *Levin v. Knight*, 780 F.2d 786 (9th Cir. 1986). First, as to the antitrust claim, *Wilcox*, 815 F.2d 522, controls. We held there that a bank does not violate the Sherman Act simply by pegging its interest rate to the interest rates of other banks. A mere showing by a plaintiff of rate parallelism is

not enough. *Id.* at 526. Plunkett has failed to demonstrate that FIBA's pegging of its rate to that of FIBO was anything but a legitimate business practice. In fact, he does not begin to approach the level of proof of unlawful concerted activity required for his antitrust claim, as the district court noted.

Second, as to the various claims deriving from Plunkett's fraudulent collusion theory, even assuming, *arguendo*, that FIBO and FIBC are liable for misrepresentation to *Oregon* borrowers, there is nothing in the record from which a trier of fact might reasonably conclude that *Plunkett* has a cause of action against FIBA, FIBO, and FIBC. He had no business relationship with either FIBO or FIBC and cannot demonstrate that any relationship either had with FIBA affected him. Neither the banks' business connections nor the fact that FIBA and FIBO may have employed the same loan officer at different times offers credible evidence of collusive conduct against Plunkett. The district court, it must be concluded, correctly rejected Plunkett's allegation that the banks conspired to defraud him.

Plunkett alternatively seeks to have his pendent claims dismissed without prejudice. Since all of his claims, both state and federal, are based on an allegation of conspiracy, the district court rendered summary judgment against all of them. This was certainly within the court's discretion, *Schultz v. Sundberg*, 759 F.2d 714, 718, (9th Cir. 1985), and, especially given the factual paucity of appellant's case, a proper exercise of discretion, *Jones v. Community Redevelopment Agency*, 733 F.2d 646, 651 (9th Cir. 1984).

The district court is AFFIRMED.

## APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

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| MICHAEL E. PLUNKETT; LANE + KNORR + PLUNKETT, Architects and Planners; LANE + KNORR + PLUNKETT, Investment Company; and all others similarly situated,<br><br>Plaintiffs,<br><br>vs.<br><br>FIRST INTERSTATE BANK OF ALASKA, formerly Alaska Bank of Commerce; FIRST INTERSTATE BANCORP; FIRST INTERSTATE BANK OF OREGON, formerly First National Bank of Oregon; and Unknown Defendants DOES 1 through 100,<br><br>Defendants. | No. A84-387 Civil<br><br>ORDER<br><br>(Summary Judgment Granted)<br><br>(Filed May 15, 1989) |

The court has now before it a motion by defendants First Interstate Bank of Oregon (FIBO) and First Interstate Bancorp (FIBC) seeking summary judgment, judgment on the pleadings, and, alternatively, for more definite statement. The motion is made pursuant to Rules 12(c) and 56, Federal Rules of Civil Procedure, and is made on the grounds that there are no genuine issues of material fact in dispute and that the defendants are therefore entitled to judgment as a matter of law, judgment on the pleadings, or, alternatively, a motion/order for a more definite statement. The motion is opposed by plaintiff. The court has heard oral argument.

In 1981, the plaintiff executed a note to secure a loan from the Alaska Bank of Commerce in the amount of $1.667 million at an interest rate equal to 3.5% above "the prime rate". The note defined "the prime rate" as being "the prime rate being charged by the FIRST NATIONAL BANK OF OREGON, PORTLAND, OREGON, to its most credit worthy borrowers during the term of this note." On February 11, 1982, plaintiff borrowed $335,600.00 from the Alaska Bank of Commerce, upon which interest was set at the "prime rate" of FIBO.

At the time the loans were made, the Alaska Bank of Commerce had no connection with either FIBC or FIBO. FIBO, formerly known as First National Bank of Oregon, was at all pertinent times a wholly-owned subsidiary of FIBC. Neither of FIBO or FBIC was involved in the loans to the plaintiff, nor did they have knowledge of the loans. Neither FIBO nor FIBC had (or have) any participation in the loans.

In February 1983, the Alaska Bank of Commerce entered into a franchise agreement with FIBC and changed its name to First Interstate Bank of Alaska (Interstate of Alaska). The franchise agreement did not result in either FIBC or FIBO obtaining any interest in First Interstate Bank of Alaska, nor did it result in either entity becoming a participant in the loan to the plaintiff.

Rule 56(c), Federal Rules of Civil Procedure, provides in relevant part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that

> the moving party is entitled to a judgment as a matter of law.

The court views the evidence and the inferences therefrom in the light most favorable to the non-moving party. *Levin v. Knight*, 780 F.2d 786, 787 (9th Cir. 1986).

Three U.S. Supreme Court cases have clarified what a non-moving party must do to withstand a summary judgment motion. As explained by the Ninth Circuit in *California Architectural Building Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987):

> First, the Court has made clear that if the non-moving party will bear the burden of proof at trial as to an element essential to its case, and that party fails to make a showing sufficient to establish a genuine dispute of fact with respect to the existence of that element, then summary judgment is appropriate. *See Celotex Corp. v. Catrett*, [477 U.S. 317], 106 S. Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). Second, to withstand a motion for summary judgment, the non-moving party must show that there are "genuine factual issues that properly can be resolved only by a finder of fact *because they may reasonably be resolved in favor of either party*." *Anderson v. Liberty Lobby, Inc.*, [477 U.S. 242] 106 S. Ct. 2505, 2511, 91 L.Ed.2d 202 (1986) (emphasis added). Finally, if the factual context makes the non-moving party's claim *implausible*, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

The plaintiff's revised second amended complaint makes eleven claims for relief.

The plaintiff's first claim for relief is that the defendants committed a violation of the "Sherman Act, 15 U.S.C. § 1, *et seq.*" The plaintiff contends that the defendants engaged in this unlawful conduct as follows: first, FIBO engaged in unlawful conduct with persons not named as defendants, by using the "count of four" method of setting the prime rate of FIBO. Second, FIBO and Interstate of Alaska conspired to fix prices and Interstate of Alaska subsequently contracted with the plaintiff.

The "count of four" method of setting a bank's prime rate involves a bank following the lead of four other major banks. This method of setting the prime rate has been expressly held as being non-violative of the Sherman Act. *Wilcox v. First Interstate Bank of Oregon, N.A.*, 815 F.2d 522, 526 (9th Cir. 1987). The plaintiff claims that *Wilcox* is inapplicable to the instant case because *Wilcox* involved a bank exercising competitive independent business judgment.

> "[T]he fact that competitors may see proper, in the exercise of their own judgment, to follow the prices of another manufacturer, does not establish any suppression of competition or show any sinister domination."

*Id.* (citation omitted).

While the plaintiff's understanding of *Wilcox* is correct, he fails to provide the court with any facts which evidence "any suppression of competition or show any sinister domination." Indeed, all of the plaintiff's argument in this regard amounts to pure allegation and speculation. FIBO and Interstate of Alaska had no relationship whatsoever at the time the subject loans were made. Furthermore, "[r]eliance on other banks' prime rate

charges is a convenient and accurate way for [a bank] to maintain its prime rate at the level set by the national market." *Id.* The Ninth Circuit's decision in *Wilcox* is also highly instructive on the issue of a plaintiff's burden of proof in a Sherman Act case such as the case at bar. Specifically, the court in *Wilcox* held:

> Horizontal price setting is illegal *per se*. The borrowers are not required to prove that defendants entered into an express agreement to fix prices. An agreement may be inferred from circumstantial evidence of "a common design and understanding, or a meeting of minds in an unlawful arrangement. . . . " Nevertheless, when relying solely on circumstantial evidence, a plaintiff must present evidence from which an inference of conspiracy is more probable than an inference of independent action. The plaintiff's burden is to produce evidence "that is capable of sustaining a rational inference of conspiracy and that tends to exclude the possibility that the defendant acted independently of the alleged co-conspirators, and thus lawfully." Thus, antitrust law limits the range of permissible inferences from ambiguous evidence. "[C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy."

*Id.* at 525 (citations omitted).

The plaintiff has failed to make a showing that there are genuine factual issues that can be resolved only be a finder of fact because they may reasonably be resolved in favor of either party. At oral argument on this matter, plaintiff argued that the mere denial of his allegations by officers of the defendant entities is not sufficient evidence

to sustain their motion for summary judgment. The plaintiff fails to understand that, per *California Architectural Building Products, Inc.*, 818 F.2d at 1468, as the non-moving party bearing the burden of proof at trial, he must make a showing sufficient to establish a genuine dispute of fact with respect to the existence elements of his case. The evidence submitted by the plaintiff simply fails to make such a showing.

The plaintiff contends that the "placement of loan officers", including Robert McWhorther, a former FIBO employee, at Interstate of Alaska, supports his contention that there was a conspiracy to fix prices. This contention, along with the rest of plaintiff's arguments, does not meet the plaintiff's burden to produce evidence "that is capable of sustaining a rational inference of conspiracy and that tends to exclude the possibility that the defendant acted independently of the alleged co-conspirators, and thus lawfully." In fact, McWhorther had been fired by FIBO and had himself filed a lawsuit against FIBO alleging breach of contract and outrageous conduct and deceit. There is no genuine issue of material fact in dispute as to whether or not McWhorther was a "plant" of FIBO. The facts (as opposed to plaintiff's speculation and conjecture) are that he was not.

Furthermore, the "correspondence" relationship between the banks that plaintiff contends is further evidence of a conspiracy is completely unsupported by any of the facts before the court. There must have been some communication regarding Oregon's prime rate; but acquiring knowledge of what that rate was and merely referencing it is not a conspiracy.

Thus, the defendants' motion for summary judgment will be granted as to the plaintiff's first claim for relief.

The plaintiff's remaining ten claims for relief all hinge on the allegation that the FIBO and FIBC conspired between themselves and/or with other entities. The plaintiff has failed to establish any conspiracy between defendants FIBC and FIBO and/or between either of those entities and the other defendants. Nor has the plaintiff made any showing whatsoever that FIBC or FIBO conspired with any other person or entity to do anything which would support any of the plaintiff's other ten claims for relief. In short, since the facts before the court do not indicate that there is any reason to believe that either FIBC or FIBO had any actionable connection whatsoever with the plaintiff, it is inescapable that summary judgment must be granted in favor of defendants FIBC and FIBO.[1]

For the foregoing reasons, the defendants' motion for summary judgment is hereby granted. Plaintiff's complaint against defendants First Interstate Bank of Oregon and First Interstate Bancorp is hereby dismissed.

DATED at Anchorage, Alaska, this 12th day of May, 1989.

/s/ H. Russel Holland
United States District Judge

cc: M. Plunkett
J. Hedland (HEDLAND)
J. Gorski (HUGHES)

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[1] In light of this conclusion, the court need not address the defendants' alternative motions.

## APPENDIX C

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IN THE UNTIED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

| | | |
|---|---|---|
| MICHAEL E. PLUNKETT, et al., Plaintiff, vs. FIRST INTERSTATE BANK OF ALASKA, et al., Defendants. | ) | No. A84-387 |

FINAL JUDGMENT

(Filed June 10, 1989)

This court having granted motions for summary judgment in favor of the defendants,

IT IS HEREBY ORDERED AND ADJUDGED that plaintiffs' complaint against defendants, First Interstate Bank of Oregon, First Interstate Bancorp, and FDIC, receiver of First Interstate Bank of Alaska, is hereby dismissed.

DATED at Anchorage, Alaska, this 16th day of June, 1989.

/s/ H. Russel Holland
United States District Judge

cc: O&J 3571
M. Plunkett
J. Hedland (HEDLAND)
J. Gorski (HUGHES)

## APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

| | |
|---|---|
| MICHAEL E. PLUNKETT, et al., Plaintiffs, vs. FIRST INTERSTATE BANK OF ALASKA, et al., Defendants. | No. A84-387 Civil<br>*ORDER*<br>(Status Conference)<br>(Filed Sep. 22, 1988) |

A status conference was held in this case on September 19, 1988.

This case is again at issue with the filing of amended pleadings, including an answer of the Federal Deposit Insurance Corporation as receiver for First Interstate Bank of Alaska on June 23, 1988. The court's stay on account of the involvement of the FDIC in the case has expired.

The court has pending a motion for summary judgment brought on behalf of First Interstate Bancorp and First Interstate Bank of Oregon. The parties are concerned that there is additional discovery which ought to be done as a predicate to the court's consideration of that motion. Counsel have agreed that plaintiff will undertake such discovery as he deems necessary for purposes of the defendants' summary judgment motion. That discovery shall be completed on or before November 22, 1988. On

or before December 7, 1988, plaintiff may file a supplemental opposition to defendants' motion for summary judgment. Defendants may file a supplemental reply on or before December 19, 1988.

The court and parties discussed, and it has been clearly understood, that plaintiff must accomplish any discovery which he deems necessary or appropriate to the summary judgment motion of defendants within the time provided hereinabove. It is equally clear, however, that should defendants' motion for summary judgment be denied, there may be additional discovery to be undertaken, and the court will address that possibility at a subsequent date.

Defendant FDIC has indicated that it will be filing a motion for summary judgment also. That motion shall be served and filed on or before October 20, 1988, in order that it may be considered with the other defendants' like motion.

DATED at Anchorage, Alaska, this 21 day of September, 1988.

/s/ H. Russel Holland
United States District Judge

cc: M. Plunkett
J. Hedland (HEDLAND)
J. Gorski (HUGHES)

**APPENDIX E**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| MICHAEL E. PLUNKETT,<br>Plaintiff-Appellant,<br>and<br>LANE, KNORR & PLUNKETT, ARCHITECTS AND PLANNERS; LANE, KNORR & PLUNKETT INVESTMENT COMPANY, a/k/a LKP Investment Company,<br>Plaintiffs-Appellants,<br>vs.<br>FEDERAL DEPOSIT INSURANCE CORPORATION, Receiver of First Interstate Bank of Alaska; FIRST INTERSTATE BANK CORPORATION; FIRST INTERSTATE BANK OF OREGON,<br>Defendants-Appellees. | ) | No. 89-35500<br><br>ORDER<br><br>(Filed July 18, 1990) |

Before: FARRIS, PREGERSON, and FERGUSON, Circuit Judges.

A majority of the panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has

requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

## APPENDIX F

John S. Hedland, Esq.
HEDLAND, FLEISCHER, FRIEDMAN,
BRENNAN & COOKE
1227 West 9th Avenue, Suite 300
Anchorage, Alaska 99501-3218
907/279-5528

Attorneys for Defendant
FIRST INTERSTATE BANCORP
and FIRST INTERSTATE BANK OF OREGON

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

| | | |
|---|---|---|
| MICHAEL E. PLUNKETT; LANE + KNORR + PLUNKETT, Architects and Planners; LANE + KNORR + PLUNKETT, Investment Company, and all others similarly situated,<br><br>Plaintiffs,<br><br>vs.<br><br>FIRST INTERSTATE BANK OF ALASKA, formerly, Alaska Bank of Commerce; FIRST INTERSTATE BANCORP; FIRST INTERSTATE BANK OF OREGON, formerly First National Bank of Oregon; and unknown defendants DOES 1 through 100,<br><br>Defendants. | ) | Case No. A84-387 CIV<br><br>AFFIDAVIT OF WILLIAM M. DAVIDSON |

STATE OF OREGON )
) ss.
County of Multnomah )

William M. Davidson, being first duly sworn, deposes and says:

1. I am a Senior Vice President of and Senior Credit Officer for First Interstate Bank of Oregon, N.A. fka First National Bank of Oregon and have held that position since March 1982.

2. In my position as Senior Credit Officer for this Bank, I am the person who has knowledge of all participation loans in which this Bank has an interest. I understand that this action arises out of two loans made by the Alaska Bank of Commerce to Michael E. Plunkett, and/or entities in which he has an interest as reflected by the caption herein, the most recent loan having been made on February 11, 1982. First Interstate Bank of Oregon, N.A. is not now nor has it ever been a participant in any of the said loans nor has it otherwise become involved in any way in such loans. This Bank has not received any money whatsoever from any source relating in any manner to the said loans.

3. This Bank, to my knowledge, did not make any representations, written or oral, to Mr. Plunkett or have any conversations with him whatsoever in connection with the loans in questions. Similarly, to my knowledge, this Bank had no communication with any of the entities in which Mr. Plunkett has an interest.

FURTHER AFFIANT SAYETH NOT.

DATED:

/s/ William M. Davidson
William M. Davidson

Subscribed and sworn to before me this 28th day of MARCH, 1988.

/s/ _____
Notary Public for Oregon
My Commission Expires: 1/21/91

## APPENDIX G

John S. Hedland, Esq.
HEDLAND, FLEISCHER, FRIEDMAN,
BRENNAN & COOKE
1227 West 9th Avenue, Suite 300
Anchorage, Alaska 99501-3218
907/279-5528

Attorneys for Defendant
FIRST INTERSTATE BANCORP
and FIRST INTERSTATE BANK OF OREGON

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

| | |
|---|---|
| MICHAEL E. PLUNKETT; LANE + KNORR + PLUNKETT, Architects and Planners; LANE + KNORR + PLUNKETT, Investment Company, and all others similarly situated,<br><br>Plaintiffs,<br><br>vs.<br><br>FIRST INTERSTATE BANK OF ALASKA, formerly, Alaska Bank of Commerce; FIRST INTERSTATE BANCORP; FIRST INTERSTATE BANK OF OREGON, formerly First National Bank of Oregon; and unknown defendants DOES 1 through 100,<br><br>Defendants. | Case No. A84-387 CIV<br><br>AFFIDAVIT OF DAVID S. BELLES |

STATE OF OREGON )
) ss.
County of Multnomah )

David S. Belles, first being duly sworn, deposes and states:

1. I am an Executive Vice President of First Interstate Bank of Oregon, N.A. fka First National Bank of Oregon and have held that position since September, 1978.

2. First Interstate Bank of Oregon, N.A., hereinafter FIOR, is a subsidiary of First Interstate Bancorp, a bank holding company. FIOR does not have any ownership interest in First Interstate Bank of Alaska. FIOR does not control, and never has controlled, activities of First Interstate Bank of Alaska, or its employees or officers.

3. I understand that this action arises out of two loans made by the Alaska Bank of Commerce to Michael E. Plunkett and/or entities in which he has an interest; the most recent one having been made on February 11, 1982. It is my understanding that the Alaska Bank of commerce loaned money to Mr. Plunkett at an interest rate that was pegged to the prime rate of First National Bank of Oregon. FIOR did not specifically authorize the Alaska Bank of Commerce to reference interest rates to FIOR's prime rate and I had no knowledge that it was doing so. It is, however, generally understood in banking circles that it was and is a common and accepted practice for one bank to reference interest rates charged on specific loans to another Bank's prime rate even though there is no relationship between the Banks. Further, not all banks announce a prime rate. It is not surprising that the Alaska Bank of Commerce selected the prime rate of First National Bank of Oregon as an interest index. This Bank is, and for a long period of time has been, one of the two

largest Banks in Oregon and Oregon is probably the Pacific Coast state most comparable to Alaska in terms of its economy.

4. FIOR's practice in announcing changes in its prime rate was and is to issue a brief press release for dissemination to interested local media. An exemplar of the form of press release used to announce prime rate changes during the period January 1980 through February 1982 is attached hereto as Exhibit A. The press releases do not state that the prime rate is the lowest rate charged any customer under any circumstance. Further, FIOR did not ever publicly announce or hold out that its prime rate was the lowest rate charged any customer under any circumstance.

5. I understand that plaintiff in this action alleges that certain defamatory statements were made by an individual named Frank Kaufmann, identified in the complaint as an employee of First Interstate Bank of Alaska. To the best of my knowledge, information and belief, and based upon my review of the records of FIOR, FIOR and its employees were totally uninvolved in such statements, and did not authorize, adopt or ratify them if they were, in fact, made. At no time did FIOR control or direct the activities of Frank Kauffman in any respect whatsoever.

6. I also understand that plaintiff in this action alleges that there was a conspiracy and collusion among various parties to deny plaintiff credit at several Alaska banks. To the best of my knowledge, information and belief, and based upon my review of the records of FIOR, if such a conspiracy or collusion existed, FIOR was not a party to it and had no knowledge of it or involvement in

it whatsoever. To the best of my knowledge, information and belief, FIOR never colluded, conspired or other [sic] otherwise acted in any manner whatsoever with respect to any attempts by plaintiff to obtain credit, and never sought in any manner whatsoever to prevent him from obtaining credit. If FIOR were, in fact, a party to such collusion or conspiracy, I believe it would have come to my attention. To the best of my knowledge, information and belief, and based upon my review of the records of FIOR, FIOR had never heard of, and had no dealings whatsoever with Mr. Plunkett and his companies until this lawsuit was filed. The only information that suggests any contact whatsoever is Mr. Plunkett's allegations in his complaint is that he contacted FIOR to ascertain its prime rate on several occasions.

FURTHER AFFIANT SAYETH NOT.

DATED:

/s/ David S. Belles
David S. Belles

Subscribed and sworn to before me this 25th day of March, 1988.

/s/ Norma Nadine Thompson
Notary Public for Oregon
My Commission Expires:
JANUARY 29, 1992

EXHIBIT A

NEWS RELEASE

Date: May 2, 1980

FIRST NATIONAL BANK OF OREGON

Contact: Ken Martin Ref. No. 058001-P

First National Bank of Oregon Friday (May 2) lowered its prime rate to 18½ percent per annum. The rate had been 19 percent since April 30.

Released 5/2 AP, UPI, Oregonian, Journal, DJC, Business wire

## APPENDIX H

John S. Hedland, Esq.
HEDLAND, FLEISCHER, FRIEDMAN,
BRENNAN & COOKE
1227 West 9th Avenue, Suite 300
Anchorage, Alaska 99501-3218
907/279-5528

Attorneys for Defendant
FIRST INTERSTATE BANCORP
and FIRST INTERSTATE BANK OF OREGON

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

| | |
|---|---|
| MICHAEL E. PLUNKETT; LANE + KNORR + PLUNKETT, Architects and Planners; LANE + KNORR + PLUNKETT, Investment Company, and all others similarly situated,<br><br>Plaintiffs,<br><br>vs.<br><br>FIRST INTERSTATE BANK OF ALASKA, formerly, Alaska Bank of Commerce; FIRST INTERSTATE BANCORP; FIRST INTERSTATE BANK OF OREGON, formerly First National Bank of Oregon; and unknown defendants DOES 1 through 100,<br><br>Defendants. | Case No. A84-387 Civ<br><br>*AFFIDAVIT OF KENNETH K. KAUFMANN* |

STATE OF CALIFORNIA )
) SS.
COUNTY OF LOS ANGELES )

KENNETH K. KAUFMANN, being duly sworn, deposes and states:

1. I am the Corporate Secretary of First Interstate Bancorp, a bank holding company and have served in that capacity since June, 1974.

2. On February 22, 1983, First Interstate Bancorp and the Alaska Bank of Commerce entered into a franchise agreement pursuant to which Alaska Bank of Commerce has the right to use the name First Interstate Bank of Alaska. This agreement authorizes the Alaska bank to participate in the automatic teller system operated by First Interstate Bancorp and allows the Alaska Bank to have access to certain other operational services provided by the Bancorp. It does not create any parent/subsidiary relationship between the signatories nor does it create any equity interest in the Alaska bank on the part of First Interstate Bancorp. First Interstate Bank of Oregon, N.A. is not a party to the franchise agreement. Other than the franchise agreement, which terminated on December 11, 1986, there was no relationship between the Alaska bank and either First Interstate Bank of Oregon, N.A. or First Interstate Bancorp. Prior to the execution of the franchise agreement, there was no relationship whatsoever.

3. First Interstate Bancorp does not control the activity of First Interstate Bank of Alaska or its employees, and has never controlled the activities of First Interstate Bank of Alaska or Alaska Bank of Commerce and its employees. It has no involvement in loans made by the Alaska Bank, and has never had such involvement.

Nor does it, or has it ever, controlled, dictated, or otherwise influenced the interest rates charged by it or the manner in which those interest rates are calculated.

4. I understand that this action arises out of two loans made by the Alaska Bank of Commerce to Michael E. Plunkett and/or entities in which he has an interest, the most recent one having been made on February 11, 1982. As of that date, there was no relationship between First Interstate Bancorp and the Alaska Bank of Commerce. First Interstate Bancorp was not a participant in any of the said loans nor did it become a participant or become otherwise involved in such loans in any manner by virtue of the franchise agreement or otherwise. First Interstate Bancorp has not received any money whatsoever from any source relating in any manner to the said loans.

5. To my knowledge First Interstate Bancorp did not make any representations, written or oral, to Mr. Plunkett or have any conversations with him in connection with the loans in question. Similarly, to my knowledge, First Interstate Bancorp had no communication with any of the entities in which Mr. Plunkett has an interest.

6. To my knowledge, at no time did First Interstate Bancorp tell Mr. Plunkett or his companies that the prime rate announced by First Interstate Bank of Oregon or First National Bank of Oregon was the lowest rate at which it loaned money to any borrowers; nor did the Bancorp ever provide Mr. Plunkett with any other information regarding the prime rate charged by First Interstate Bank of Oregon. First Interstate Bancorp did not represent to Mr. Plunkett or his companies, directly or indirectly, or to the

public generally, that the announced prime rate charged by First Interstate Bank of Oregon, N.A. was the lowest rate charged by it to any of its borrowers.

7. I understand that plaintiff in this action alleges that certain defamatory statements were made by an individual named Frank Kauffman, identified in the complaint as an employee of First Interstate Bank of Alaska. To the best of my knowledge, information and belief, and based upon a review of the records of First Interstate Bancorp, Frank Kauffman was never an employee of First Interstate Bancorp. First Interstate Bancorp and its employees were totally uninvolved in such statements, and did not authorize, adopt or ratify them if they were, in fact, made. At no time did First Interstate Bancorp control or direct the activities of Frank Kauffman in any respect whatsoever.

8. I also understand that plaintiff in this action alleges that there was a conspiracy and collusion among various parties to deny plaintiff credit at several Alaska banks. To the best of my knowledge, information and belief, and based upon my review of the records of First Interstate Bancorp, if such a conspiracy or collusion existed, First Interstate Bancorp was not a party to it and had no knowledge of it or involvement in it whatsoever. To the best of my knowledge, information and belief, First Interstate Bancorp never colluded, conspired or otherwise acted in any manner whatsoever with respect to any attempts by plaintiff or any other person or entity to obtain credit, and never sought in any manner whatsoever to prevent him from obtaining credit. To the best of my knowledge, information and belief, and based upon a review of the records of First Interstate Bancorp,

First Interstate Bancorp had never heard of, and had no dealings whatsoever with, Mr. Plunkett and his companies until this lawsuit was filed.

FURTHER AFFIANT SAITH NOT.

DATED: March 24, 1988.

/s/ Kenneth K. Kaufmann
Kenneth K. Kaufmann

SUBSCRIBED AND SWORN TO before me this 24th day of March, 1988.

[SEAL]

/s/ Olga Perez
Notary Public in and for
the State of California
My commission expires: 9-20-89

## APPENDIX I

Michael E. Plunkett, Pro Se
600 Barrow, Suite 600
Anchorage, Alaska 99501
(907) 277-5481.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

| | | |
|---|---|---|
| Michael E. Plunkett: Lane + Knorr + Plunkett, Architect and Planners; Lane + Knorr + Plunkett Investment Company; | ) | |
| Plaintiffs | ) | No. A84-387 |
| v. | ) | Civil |
| First Interstate Bank of Alaska formerly, Alaska Bank of Commerce; First Interstate Bancorp; First Interstate Bank of Oregon, formerly First National Bank of Oregon; | ) | |
| Defendants. | ) | |

AFFIDAVIT OF MICHAEL E. PLUNKETT
OPPOSITION TO MOTION FOR SUMMARY JUDGMENT
BY DEFENDANTS
FIRST INTERSTATE BANK OF OREGON
AND FIRST INTERSTATE BANCORP
MOTION FOR CONTINUANCE
MOTION TO STRIKE AFFIDAVITS

| | | |
|---|---|---|
| STATE OF ALASKA | ) | |
| | ) | s.s. |
| THIRD JUDICIAL DISTRICT | ) | |

Michael E. Plunkett, being duly sworn, deposes and states:

1. I am Michael Edward Plunkett, am a Plaintiff in this action, am owner of Lane + Knorr + Plunkett Investment Company, and Lane + Knorr + Plunkett, Architects and Planners, also Plaintiffs in this action.

2. I have personal knowledge of the following facts, am competent to testify as to them, and if called upon to testify at trial or hearing would testify as follows:

3. The first information I ever received tht [sic] First national [sic] bank [sic] of Oregon was not a participant in the loans which are the subject of this litigation was when I read the Affidavits submitted with the Motion for Summary Judgment on March 30, 1988. It was indicated to me at the time we signed the loans that First National Bank of Oregon, later First Interstate Bank of Oregon was the basis of the prime rate determination because said bank was to be or was the corresponding bank on the loan. The pegging of the prime rate to the Firt [sic] national [sic] bank [sic] of Oregon wa [sic] also a condition of the Committment [sic] Letter of May, 1980, a certified true and correct copy which is included as Exhibit 2, pages 35-42.

4. I hereby certify that Exhibit 1-5 attached to the complaint are true and correct copies of the various correspondence and loan documents executed by Plaintiffs in this case. As late as October 16,1982 the second loan was extended, with the interest rate pegged to the prime rate of First Interstate Bank of Oregon.

5. I hereby certify that a continuance is needed due to the stay granted to First Interstate Bank of Alaska as succeeded by Federal Deposit Insurance Corporation. Plaintiff cannot conduct discovery against First Interstate

Bank of Alaska until the Revised Second Amended Complaint is answered by FIBA. I have found that to conduct the depositions of former FIBA employees like Chuck Homan or R.J. Miller without the documentation to refresh their memories would be a waste of time, particularly since the interest pegging decision had to be made prior to May 1980. I further certify that I am financially unable to conduct discovery in Oregon or to even pay the costs for copies of the transcripts from the Court cases held in Oregon. Further, frrom [sic] the affidavits of FIBO employees, it is clear that they do not recollect, at least without documentary evidence or other depositions to help them, any dealings at all with Alaska bank [sic] of Commerce or FIBA. Thus, requests for admission, interrogatories, and/or requests for production of these unstayed defendants would be of little value. However, I certify that a continuance is necessary to the extent the motion for summary judgment cannot be denied outright so that at least paper discovery of FIBO and FIBC can be made. Interrogatories will at least theoretically require the parties to conduct some investigation of records. Unfortunately, records may have vanished, and any decision regarding how the prime rate definition was generated may rest only in the minds of the one or two individuals who made the decision.

6. I have reviewed the affidavits of Moving Party and hereby certify that sufficient hostility exists between FIBA employees, former, particularly Robert McWhorter, Frank Kauffman, Albert Swallin, Charles Homan and others that I could not obtain an affidavit voluntarily from them, and even if I could their recollections would be so vague without some refreshment by documentary

evidence that the affidavits would be insufficient to resist the motion, that is to provide more genuine issues of material fact.

7. In 1979 I was led to believe by a Alaska Bank of Commerce Officer Johnson that financing had been obtained for our building through Oregon Trails Savings and Loan. Later this statement was repudiated by others at ABC. Oregon Trails was to be a participant and the prime rate was to be based on the Oregon Trails Prime Rate. When later, after Plaintiffs literally handed the take-out financing for the project to Homan from Alaska Small Business Loan Program, the committment [sic] letter had the First National Bank of Oregon listed as the basis for the prime rate.

9. When in early 1983 I learned of the franchise with FIBC, and had known of the buyout of First National Bank of Oregon, I was not surprised when Bob McWhorter became in charge of commercial loans, since I learned he had been with FIBO in Oregon, Eugene I think I learned. Kauffman had come aboard earlier, and after McWhorter took over things deteriorated. It was my analysis that McWhorter was either reporting to or looking out for the interests of the parent. FIBC or the participant, FIBO. Things immediately soured with FIBA and Plaintiff, FIBA started obtaining certificates of deposit from the Anchorage School District in large amounts like $25,000,000 in a given month. At the same time credit was denied Plaintiffs, with McWhorter stating we were on an increasing spiral of debt or words to that effect. This was immediately after Plaintiff was terminated from its services on the Gruening Junior High School Project by ASD.

10. Plaintiffs incorporate all affidavits on file inthis [sic] case as if fully set forth herein.

11. I certify further discovery is needed to determine the amount and style of interaction, if any between First Interstate of Oregon and First Interstate Bancorp and First Interstate of Alaska. This is especially true due to the fact that to continue to obtain funds from ASD, FIBA may have had to accede to the demands of ASD, such as squeezing Plaintiffs. This would benefit not just FIBA but the franchisor FIBC particularly if the franchise was on a percentage basis, and FIBO if they were participating with FIBA on any loans, of any kind, or FIBA was participating in some other way.

12. We were charged in excess of $55,000 in loan fees on the first interim loan alone. No architects or engineers were ever retained to visit the site or review the design. This amount was never shown to us or broken down in any way. The high amount is either as a result of the risk incurred, or the fact that a portion of the loan fee went to a participant.

12. I first learned of the antitrust litigation in may [sic] 1984 when I red [sic] the article in the newspaper about the outcome of the trial. I had remembered that our loans were based on the prime rate of FIBO and called to find out what was going on.

13. In 1984, to attempt to avoid foreclosure, Plaintiffs submitted loan packages to every bank in town. Each one denied credit to Plaintiff for various reasons. The banks were uniformly vague about the reasons except a few, such as Mike Van at Alaska Continental Bank who specifically stated that the lawsuit with ASD would have

to go away before any money would be lent. National Bank of Alaska was the funniest. Jan Sieberts signalled the loan officer in my preence [sic]. Thereafter I was put off by Mr. Struts (Sp?) and finally denied credit. Alaska Statebank [sic] strung us along for several months before turning us down. Clearly all had communicated with FIBA. FIBA had supposedly related to Rogers and Babler or MAPCO Alaska Inc. employees as early as 1982 the falsehood that Plaintiffs were nearly bankrupt. Alaska State Bank is the only Alaska bank to which I have first hand knowledge tht [sic] they discounted below thier [sic] prime rate. I never found out how they defined their prime rate however. They discounted one pont [sic] below prime to the City of Unalaska on a School and Swimming Pool interim loan for which plaintiffs were the architects. I also learned from Moody's Industrial File that Don Mellish, former Chairman of the Board of National Bank of Alaska was a Board Member of Mapco Inc. parent of MAPCO Alaska Inc. during this period.

15. During the course of the troubles with FIBA, they notarized a Uniform Commercial Code filing signature by myself by affixing a notary that had not even been issued at the time the signature was affixed. This was reported to the Alaska State Troopers who claimed it was a civil matter.

16. Each month we received a loan statement through the mail with the interim finance interest rate for that month printed on it. That rate, after telephoninf [sic] FIBO was always 3.5 points above the prime rate given us by FIBO for the particular month. Thus, as the prime rate had been admittedly discounted, said prime rate cannot

be the prime rate charged FIBO's most credit worthy borrowers.

17. I learned from counsel for plaintiffs in Wilcox case that FIBO had made some loans at a rate as low as 6%. This could have been 7 to 8 points below the prime rate or more during the time that the loans were in place since the prime rate was as big as 21% at one point.

18. While designing a branch bank for FIBA in early 1983, we met with a representative of FIBC who advised FIBA on the layout FIBC wanted, signage, and other features. FIBC clearly was involved with the design and had decision making control over it to an unknown amount.

FURTHER YOUR AFFIANT SAYETH NAUGHT

/s/ Michael E. Plunkett
Michael E. Plunkett

Subscribed to and sworn before me this 25 day of April 1988.

/s/ _____
Notary Public for Alaska
My Commission Expires
_____

## APPENDIX J

Michael E. Plunkett, Pro Se
600 Barrow, Suite 200
Anchorage, Alaska 99501
(907) 276-4939

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

| | |
|---|---|
| Michael E. Plunkett, et al, | ) |
| Plaintiffs. | ) |
| v. | ) |
| First Interstate Bank of Alaska, formerly, Alaska Bank of Commerce, et al, | ) |
| Defendants. | ) |

CASE NO. A 84-387 Civil

AFFIDAVIT OF CHARLES HOMAN

STATE OF ALASKA )
) s.s.
THIRD JUDICIAL DISTRICT )

Charles Homan, being duly sworn, deposes and states:

1. I am Charles Homan, have personal knowledge of the following facts, am competent to testify as to the following facts and if called upon to testify at a hearing or at trial would testify as follows:

2. I was Vice President of Alaska Bank of Commerce in Anchorage, Alaska, during the period in which Lane + Knorr + Plunkett Investment Company, an Alaska General Partnership consisting of Michael Edward Plunkett,

and Donald R. Knorr applied for and obtained interim financing for the construction of an Office -Condominium complex known as the 600 Barrow Building located on Block 110, Lot 1, of the Original Townsite of Anchorage, Alaska.

3. During the time in which Lane + Knorr + Plunkett Investment Company was applying for and secured interim financing for the 600 Barrow Project I was the Commercial Loan Officer at Alaska Bank of Commerce most familiar with the project and the loans.

4. I was employed as Vice President of Alaska Bank of Commerce when it changed its name to First Interstate Bank of Alaska in 1983.

5. I left employment of First Interstate Bank of Alaska in February, 1984.

6. Lane + Knorr + Plunkett Investment Company executed two interim finance agreements entitled "Deed of Trust Note" with Alaska Bank of Commerce. The First Deed of Trust Note was in the loan amount of $1,667,200, and was originally due and payable on June 15, 1981. A copy is attached hereto as Exhibit 1, The second Deed of Trust Note was in the amount of $355,600.00 and was executed on February 11, 1982. A copy of the Second modification to Deed of Trust Note is attached hereto as Exhibit 2.

7. Exhibits 1 and 2 hereto were standard Deed of Trust Note forms used by Alaska Bank of Commerce. The forms used in the preparation of Exhibit 1 and 2 hereto. Exhibits 1 and 2 hereto were prepared for signature by Lane + Knorr + Plunkett Investment Company under my supervision.

9. I executed loan documents on behalf of Alaska Bank of Commerce in conjunction with the loans secured by the Deed of Trust Notes contained in Exhibits 1 and 2 hereto and was authorized to do so by the Board of Directors of Alaska Bank of Commerce.

7. Both Exhibit 1 and Exhibit 2 based the rate of interest to be charged on three and one half points above the prime rate charged by the First National Bank of Oregon, subsequently called the First Interstate Bank of Oregon. The "prime rate" was defined in the Deed of Trust Notes as "the rate being charged by the FIRST NATIONAL BANK OF OREGON, PORTLAND, OREGON to its most credit – worthy borrowers during the term of this note. The Deed of Trust Notes were set up in this fashion so that if First Interstate Bank of Oregon, formerly First National Bank of Oregon, were to participate with Alaska Bank of Commerce in any of many commercial interim finance loans being made during the 1980-1982 period, the interest rates would correspond with the published prime rate of First National Bank of Oregon, now First Interstate Bank of Oregon.

8. During the 1980 through 1984 period Alaska Bank of Commerce (later called First Interstate Bank of Alaska) participated with First Interstate Bank of Oregon, formerly First National Bank of Oregon in interim finance loans. I have no specific recollection whether Exhibits 1 and 2 hereto were loans in which First National Bank of Oregon and/or First Interstate Bank of Oregon participated with Alaska Bank of Commerce, (later called First Interstate Bank of Alaska).

7. While still employed by First Interstate Bank of Alaska, I learned that a consumer group had brought a class action suit against First Interstate Bank of Oregon claiming that First Interstate Bank of Oregon had discounted loans below their published prime interest rate.

FURTHER YOUR AFFIANT SAYETH NAUGHT

/s/ Charles Homan
Charles Homan

Subscribed and sworn to before me this 19th day of September, 1988.

/s/ Sam M. Dua
Notary Public for Alaska
My Commission Expires
5-14-92

*Certificate of Service*
I hereby certify that on 19 September, 1988 I caused to be hand delivered a copy of the above Affidavit with Exhibits to the offices of John Hedlund and James Gorski, counsel of record in this case.

/s/ Michael E. Plunkett
Michael E. Plunkett, Pro Se

---

**EXHIBIT 1**

DEED OF TRUST
NOTE

US $1,667,200.00 Anchorage, Alaska

FOR VALUE RECEIVED, the undersigned jointly and severally promise(s) to pay to, or to order

ALASKA BANK OF COMMERCE

a corporation organized under the laws of the State of Alaska, at its office in Anchorage, Alaska or at such other place as the holder may designate in writing, the principal sum of ONE MILLION SIX HUNDRED SIXTY-SEVEN THOUSAND TWO HUNDRED AND NO/100 with interest from date hereof until paid at the rate of TWELVE per cent 12.00% per annum, but not less than the prime rate plus THREE & ONE-HALF per cent 3.50% (Computed on the basis of a 365 day year and computed on balances remaining from time to time unpaid). The prime rate is defined as the prime rate being charged by the FIRST NATIONAL BANK OF OREGON, PORTLAND, OREGON to its most credit-worthy borrowers during the term of this note. The interest rate shall be adjusted on the first day of the month following a prime rate change by the bank. The prime rate as of the date of this note is ———. Interest hereon [sic] shall be paid monthly on the last day of each calender month during the term hereof. In the event interest is not paid on the last day of a calendar month, said interest shall then be added to the principal balance and become a part thereof, and thereafter bear interest at the same rate as the principal. Payment of the entire indebtedness evidenced by this note shall be due and payable on the 15th day of JUNE, 1981. This note is secured by a deed of trust on even date herewith on property situated in the ANCHORAGE Recording District, THIRD Judicial District, State of Alaska.

In the event of default in any of the foregoing payments or in any of the agreements contained in the deed of trust securing this note, the principal sum then remaining unpaid together with accrued interest thereon shall

forthwith become due and payable at the election of the holder of this note. Failure to exercise such option shall not waive the right to exercise it upon any continuing or subsequent default. The under-signed jointly and severally agree to pay all costs and expenses, including attorney's fees, incurred by the holder of this note in any suit or proceeding instituted upon this note. In the event of default in any of the foregoing payments, the holder of this note may at its option foreclose the deed of trust securing this note, summarily or by suit.

The makers and each endorser of this note jointly and severally waive diligence, presentment protest and demand, and notice of protest, dishonor and non-payment of this note, expressly agree that this note or any payment hereunder may be extended from time to time by any holder hereof, and consent to the acceptance of further security for this note, without affecting the liability of any maker or endorser, guarantor and surety of this note jointly and severally waive the right to plead any statute of limitation as a defense in collection of this note for foreclosure of any instrument securing this note.

THIS NOTE is made with reference to and is to be construed in accordance with the laws of the State of Alaska.

LANE + KNORR + PLUNKETT INVESTMENT COMPANY, dba LKP INVESTMENT COMPANY a partnership consisting of Michael E. Plunkett and Donald R. Knorr.

/s/ Michael E. Plunkett
Michael E. Plunkett,
individually

by: /s/ Michael E. Plunkett
Michael E. Plunkett,
Partner

/s/ Donald R. Knorr
Donald R. Knorr,
individually

by: /s/ Donald R. Knorr
Donald R. Knorr,
Partner

---

**EXHIBIT 2**

MODIFICATION OF DEED & TRUST NOTE

FOR VALUABLE CONSIDERATION, it is hereby agreed by and between Lane+Knorr+Plunkett Investment Company a/k/a LKP Investment Company a Partnership, consisting of Michael E. Plunkett and Donald R. Knorr FIRST PARTY, and ALASKA BANK OF COMMERCE, an Alaska Banking Corporation, Second Party, that that certain Promissory Note dated 2/11/82, in the amount of $355,600.00 plus interest at Three & One Half percent (3.50%), Over Prime Fully floating of FIBO Floor 15.0% payable Interest Monthly and have a remaining balance of $354,170.92 with interest paid to, ——— secured by a Deed of Trust dated 2/11/82, recorded 2/22/82, in book 701, Page 0049, in the records of the Anchorage Recording District, Third Judicial District, State of Alaska, and covering the following described real property:

> SEE ATTACHED LEGAL DESCRIPTION EXHIBIT "A", (CONSITING [sic] OF TWO PAGES, PARCEL A THRU [sic] G).
>
> is hereby amended in the following respect, to wit:

ALL REMAINING PRINCIPAL AND INTEREST OWED UNDER THIS NOTE OR ANY DOCUMENT SECURING IT PAYMENT SHALL BE DUE AND PAYABLE IN FULL ON OR BEFORE 12/31/82.

It is further agreed that a copy of this agreement shall be attached to said note. In all other respects the Note and Deed of Trust securing the note are hereby ratified and confirmed.

IN WITNESS WHEREOF the Parties hereto have hereunder set their hands this ___ day of October, 1982.

ALASKA BANK OF COMMERCE

By _____
Charles E. Homan
Vice President

LANE + KNORR + PLUNKETT INVESTMENT COMPANY a/k/a LKP INVESTMENT COMPANY, a Partnership consisting of Michael E. Plunkett and Donald R. Knorr

By /s/ Michael E. Plunkett
Michael E. Plunkett, Partner

By /s/ Donald R. Knorr
Donald R. Knorr, Partner

By /s/ Michael E. Plunkett
Michael E. Plunkett, Individually

By /s/ Donald R. Knorr
Donald R. Knorr, Individually

## APPENDIX K

John S. Hedland, Esq.
HEDLAND, FLEISCHER, FRIEDMAN,
BRENNAN & COOKE
1227 West 9th Avenue, Suite 300
Anchorage, Alaska 99501-3218
907/ 279-5528

Attorneys for Defendant
FIRST INTERSTATE BANCORP
and FIRST INTERSTATE BANK OF OREGON

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

| | | |
|---|---|---|
| MICHAEL E. PLUNKETT; LANE + KNORR + PLUNKETT, Architects and Planners; LANE + KNORR + PLUNKETT, Investment Company, and all others similarly situated, Plaintiffs, vs. FIRST INTERSTATE BANK OF ALASKA, formerly, Alaska Bank of Commerce; FIRST INTERSTATE BANCORP; FIRST INTERSTATE BANK OF OREGON, formerly First National Bank of Oregon; and unknown defendants DOES 1 through 100, Defendants. | ) | Case No. A84-387 CIV<br><br>AFFIDAVIT OF EDMUND J. BOCK |
| STATE OF OREGON | ) | |
| | ) | ss. |
| County of Multnomah | ) | |

Edmund J. Bock, first being duly sworn, deposes and states:

1. I am an Assistant Vice President of First Interstate Bank of Oregon, N.A. fka First National Bank of Oregon and since March, 1987, I have been the manager of the Financial Institutions Group of this Bank's Corporate Banking Group. In my position as manager of the Financial Institutions Group I am the custodian of the majority of the correspondent bank files of this Bank, including the correspondent bank file relating to Alaska Bank of Commerce, nka First Interstate Bank of Alaska. I have reviewed this Bank's entire correspondent banking file relating to Alaska Bank of Commerce, nka First Interstate Bank of Alaska and if called as a witness at trial, could competently testify to the following:

2. As a correspondent bank of this Bank, Alaska Bank of Commerce obtained a federal funds borrowing line, also referred to as an overnight borrowing line, from this Bank on March 17, 1981. This line continued in place until March 31, 1985 when it was terminated. This facility enabled Alaska Bank of Commerce to borrow funds from First Interstate Bank of Oregon on an overnight basis. Banks use a facility like this for short term liquidity purposes, for example, to enable the bank to borrow on an overnight basis to meet Federal Reserve Bank reserve requirements.

3. This Bank had no means and could have no means of knowing for what purposes Alaska Bank of Commerce was using the borrowed funds. Further, due to the short term overnight nature of the borrowing this Bank could never have tied repayment of these overnight

borrowings to repayment of any subsequent loans made by Alaska Bank of Commerce to its Borrowers.

4. The interest rate charged by First Interstate Bank of Oregon to Alaska Bank of Commerce on the short term overnight borrowings is what is sometimes referred to as the Federal Funds rate. This rate is not in any way pegged to the Bank's prime rate.

5. It is very common and is in fact necessary for the efficient operation of the banking system in the United States for totally unrelated banks to have correspondent relationships with one another. For instance, First Interstate Bank of Oregon, N.A. at the present time has a correspondent relationship with approximately 39 independent non-affiliated banks nationwide.

FURTHER AFFIANT SAYETH NOT.

DATED: 4-28-88

/s/ Edmund J. Bock
Edmund J. Bock

Subscribed and sworn to before me this 28 day of April, 1988.

/s/ Rebecca J. Whitney

Notary Public for Oregon
REBECCA J. WHITNEY
My Commission Expires:
NOTARY PUBLIC OREGON
My Commission Expires 10-12-90

## APPENDIX L

John S. Hedland, Esq.
HEDLAND, FLEISCHER, FRIEDMAN,
BRENNAN & COOKE
1227 West 9th Avenue, Suite 300
Anchorage, Alaska 99501-3218
907/279-5528

Attorneys for Defendants
FIRST INTERSTATE BANCORP
and FIRST INTERSTATE BANK OF OREGON

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

| | |
|---|---|
| MICHAEL E. PLUNKETT; LANE + KNORR + PLUNKETT, Architects and Planners; LANE + KNORR + PLUNKETT, Investment Company, and all others similarly situated, Plaintiffs, vs. FIRST INTERSTATE BANK OF ALASKA, formerly, Alaska Bank of Commerce; FIRST INTERSTATE BANCORP; FIRST INTERSTATE BANK OF OREGON, formerly, First National Bank of Oregon; and unknown defendants DOES I through 100, Defendants. | Case No. A84-387 Civ<br>AFFIDAVIT OF KENNETH K. KAUFMANN |

STATE OF CALIFORNIA )
) SS.
COUNTY OF LOS ANGELES )

KENNETH K. KAUFMANN, being duly sworn, deposes and states:

1. I am the Corporate Secretary of First Interstate Bancorp, a bank holding company and have previously executed an Affidavit in this action.

2. I do not know nor am I related to the "Frank Kauffman" identified in the Complaint as an Employee of First Interstate Bank of Alaska or any other person named "Frank Kauffman".

FURTHER AFFIANT SAITH NOT.

DATED: May 2, 1988

/s/ Kenneth K. Kaufmann
Kenneth K. Kaufmann

SUBSCRIBED AND SWORN TO before me this 2nd day of May 1988.

/s/ Olga Perez
Notary Public in and for
the State of California
My commission expires:
9-20-89

SEAL

The undersigned hereby swears that on the 5th day of May, 1989 the attached documents were mailed to the attorneys of record.

/s/ Judith M. Perry
Subscribed and sworn to before the date last written.
/s/ Debra A. Kurgynski
Notary Public
My Commission Expires 6/22/88

## APPENDIX M

John S. Hedland, Esq.
HEDLAND, FLEISCHER, FRIEDMAN,
BRENNAN & COOKE
1227 West 9th Avenue, Suite 300
Anchorage, Alaska 99501-3218
907/279-5528

Attorneys for Defendants
FIRST INTERSTATE BANCORP
and FIRST INTERSTATE BANK OF OREGON

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

| | |
|---|---|
| MICHAEL E. PLUNKETT; LANE + KNORR + PLUNKETT, Architects and Planners; LANE + KNORR + PLUNKETT, Investment Company, and all others similarly situated, Plaintiffs, vs. FIRST INTERSTATE BANK OF ALASKA, formerly, Alaska Bank of Commerce; FIRST INTERSTATE BANCORP; FIRST INTERSTATE BANK OF OREGON, formerly, First National Bank of Oregon; and unknown defendants DOES I through 100, Defendants. | Case No. A84-387 Civ<br>AFFIDAVIT OF LEE C. NUSICH |

STATE OF OREGON )
) SS.
County of Multnomah )

Lee C. Nusich, first being duly sworn, deposes and states:

1. I am an Associate General Counsel for First Interstate Bank of Oregon, N.A. fka First National Bank of Oregon and have held that position since November 1, 1982.

2. First Interstate Bank of Oregon, N.A., was sued in Lane County Circuit Court, State of Oregon by Robert P. McWhorter in February of 1983. A copy of McWhorter's First Amended and Supplemental Complaint which was filed in that proceeding and which sets forth McWhorter's theory of the case is attached hereto as Exhibit A and hereby made a part hereof.

3. This case continued in Lane County Circuit Court until it was finally dismissed with prejudice pursuant to settlement on or about April 27, 1987. The case was dismissed by the Circuit Court without the preparation of a formal Judgment of Dismissal. The Circuit Court did, however, send to all parties its official notice that Judgment of Dismissal was entered on April 27, 1987. A copy of that notice from the Lane County Circuit Court evidencing the dismissal having been entered in the records of the Lane County Circuit Court is attached hereto as Exhibit B and hereby made a part hereof.

FURTHER AFFIANT SAYETH NOT.

DATED: April 29, 1988

/s/ Lee C. Nushich
Lee C. Nusich

Subscribed and sworn to before me this 29 day of April, 1988.

/s/ Rebecca J. Whitney
Notary Public for Oregon
My Commission Expires: 10-12-90

---

EXHIBIT A

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR LANE COUNTY

| | |
|---|---|
| ROBERT P. McWHORTER,<br>Plaintiff,<br>vs<br>FIRST INTERSTATE BANK OF OREGON, N.A., a national banking association,<br>Defendant. | Case No. 16-83-01030<br>FIRST AMENDED AND SUPPLEMENTAL COMPLAINT<br>(Breach of Contract; Breach of Implied Contract; Outrageous Conduct; Deceit) |

Plaintiff Robert P. McWhorter, for his first separate claim for relief, alleges:

I

(Breach of Contract)

At times material herein, Plaintiff was a resident of Eugene, Lane County, Oregon.

II

Defendant is, and at all times herein mentioned, was a national banking association, existing under the laws of the United States, doing business in the County of Lane, State of Oregon, under the laws of the State of Oregon.

III

On June 11, 1969, Plaintiff and Defendant mutually agreed that Plaintiff should work for Defendant and that Defendant should employ Plaintiff. Plaintiff commenced working for Defendant on October 6, 1969. On January 25, 1982, Plaintiff was employed by Defendant as a Vice President and Branch Manager VII, and employee with a grade ranking of 18.

IV

At all times mentioned herein Defendant had in effect published personnel policies, which provided that the policies applied to any employee in that bank and defined employee as officer and non-officer alike, and further, that every employee considered for dismissal would receive completely fair and equitable treatment. At all times mentioned herein Defendant had in effect published procedures to be followed as a precondition to termination and before the termination would become effective. Defendant continued to publish its personnel policies and to amend the personnel policies at all times herein and expected Plaintiff to be bound thereby.

V

At all times mentioned herein the policy and procedures above constituted conditions of employment agreed upon between Defendant and Plaintiff. These conditions restricted Defendant's right to terminate Plaintiff's employment. These conditions were part of the consideration for Plaintiff's continuing employment services.

VI

Plaintiff duly performed all work required of him by Defendant and complied with all agreed conditions of employment.

VII

On January 25, 1982, without complying with the above-described policy and procedure, Defendant terminated Plaintiff's employment. Plaintiff was not discharged by act of the Board of Directors of Defendant, and Plaintiff, as an employee of grade 18, was not afforded the opportunity, in accordance with Defendant's published policy manual, to appear before an evaluation committee which is generally comprised of the Chairman of the Board, Vice Chairman of the Board, President, and Executive Vice President, although such appearance was requested by Plaintiff.

VIII

Thereafter, on April 30, 1982, Defendant discontinued Plaintiff's salary and benefits.

IX

Defendant breached its employment agreement with Plaintiff by terminating his employment and discontinuing his salary and benefits without first complying with its policies and procedures for effecting the dismissal of an employee. Defendant did not treat Plaintiff fairly and equitably in dismissing him, nor did it determine that he had been treated fairly and equitably prior to dismissing him.

X

On or about January 25, 1982, and at various times thereafter, Plaintiff notified Defendant of this breach.

XI

Since April 30, 1982, Plaintiff has continuously held himself out as able and willing to continue employment services for Defendant, but Defendant has refused to reinstate him. Plaintiff has also requested that Defendant comply with its procedures and policies for effecting termination, but it has refused.

XII

At the time of his termination, Plaintiff was paid an annual salary of $46,000, and received benefits with the then potential value of approximately $500,000 all as consideration for his employment services.

XIII

As a result of the conduct of Defendant and its officers, Plaintiff has suffered financial losses and expenses. The losses include lost wages while seeking replacement employment, lost future income in obtaining less remunerative replacement employment, and depletion of his savings. The expenses include the costs of locating and obtaining replacement employment, commuting to the location of the replacement employment, maintaining a separate residence there, and borrowing funds. These losses and expenses total $868,000.

XIV

Defendant's conduct as alleged hereinabove has been willful, wanton, malicious, and in disregard of societal interests and the rights of the Plaintiff. For this conduct, Defendant should be assessed punitive damages in the sum of $1,500,000.

XV

By virtue of Defendant's breach of the employment agreement and its continued refusal to reinstate Plaintiff, or comply with its policies and procedures, Plaintiff has been generally damaged in the sum of $1,404,000 and will continue to be damaged.

(Breach of Implied Contract)

For a second separate claim for relief, Plaintiff alleges:

I

Re-alleges paragraphs I through VIII and X through XV of the first claim for relief.

II

Defendant breached its employment agreement with Plaintiff by terminating his employment and discontinuing his salary and benefits without just cause and: (1) without first determining whether facts constituting just cause existed, (2) without first complying with its published policies and procedures for determining whether facts constituting just cause existed, and, for effecting the dismissal of an employee, (3) without first advising Plaintiff that his performance of the duties and responsibilities assigned him was unsatisfactory and that termination was being considered, and (4) without first affording him an opportunity to establish that no just cause existed or to improve his performance, having afforded other employees similarly situated the opportunity to do so. The published personnel policies provide that the requirements of this paragraph II (1), (2), (3), and (4) are to be complied with by the Defendant prior to Plaintiff's dismissal as an employee.

(Outrageous Conduct)

For a third separate claim for relief, Plaintiff alleges;

I

Re-alleges paragraphs, I, II and III of the first claim for relief.

II

Defendant consistently commended Plaintiff in annual evaluations of his performance of the responsibilities and duties assigned him. He was successively promoted from assistant cashier to Assistant Manager to assistant Vice President to Vice President & Manager, going from grade 7 to grade 18, all within an exceptionally short period of time. He received corresponding increases in salary, as well as increases in responsibility and duty. Defendant led Plaintiff to believe that his performance and advancement so far had been prodigious, and that he would continue to be advanced in position, responsibility, duty and salary. Plaintiff was in good health, was thirty-seven (37) years of age, and had expected to work for defendant until his retirement. Plaintiff's last performance evaluation took place effective July 1, 1981 and stated, among other things:

> "That the Eugene Main Branch is the largest branch in region 2 and requires considerable amount of managerial skill and talent which bob possesses . . . This is evidenced by the very aggressive and successful calling program and has been responsible for developing . . . new customer loans and . . . new customer deposits, plus substantial business with the existing customers since January, 1981. Bob's calls are documented outside . . . which attest to his active calling posture. It is through demonstrated leadership ability and proper delegation that he enjoys the respect of his staff and promotes good customer service in the Eugene area."

III

On January 25, 1981, Bill Davidson and Robert Derby, senior officers of Defendant corporation, having previously met with each other and determined to terminate Plaintiff, met with Plaintiff and informed his that he was relieved of his position of employment with Defendant without following published personnel policies.

IV

Defendant had not previously indicated to Plaintiff that Defendant considered Plaintiff's job performance to be unsatisfactory nor that Defendant contemplated relieving him of his position as branch manager, vice president or employee grade. On the contrary, Plaintiff's immediate prior performance evaluation of July 1, 1981 commended his performance.

V

The reasons given to Plaintiff by Davidson and Derby at the January 25th meeting for the decision to relieve him were untrue or unfounded as related to Plaintiff's job performance. Plaintiff was given no prior notice of the reasons nor an opportunity to refute the reasons or challenge the decision, nor an opportunity to correct the alleged failure of performance, which opportunity had been given to another individual.

VI

At the January 25th meeting, Davidson and Derby advised Plaintiff that his employment was not terminated

but only his position as branch manager and that Defendant would attempt to relocate him in a comparable position in Defendant corporation or with an affiliated corporation. In fact, Plaintiff's employment had been terminated at the January 25th meeting. Defendant had previously determined that the discharge was irrevocable, and Defendant did not intend to relocate or reinstate him, although it led Plaintiff to believe otherwise on several occasions. Defendant attempted to solicit the assistance of a senior vice president to obtain consideration under the policy manual and was summarily refused and advised that the decision was that vice president's and it was final.

VII

Defendant's conduct was willful and in violation of its published policies and procedures for treatment of employees on a fair basis, equally, and effecting the dismissal of an employee of Plaintiff's grade level.

VIII

As a result of Defendant's conduct, Plaintiff has suffered severe emotional distress, including shock, disappointment, humiliation, anxiety and worry. Plaintiff, in addition to the monetary losses herein alleged, has also suffered losses of self-esteem and self-confidence.

IX

By virtue of Defendant's conduct Plaintiff has been damaged in the amount of $1,500,000.

X

Defendant's conduct was intended to inflict severe emotional distress or was reckless of the conduct's predictable effects on Plaintiff. As a consequence, Plaintiff is entitled to the sum of $1,500,000 in punitive damages.

(Deceit)

For a fourth separate claim for relief, Plaintiff alleges:

I

Re-alleges paragraphs I, II, III, X and XII of the first claim for relief.

II

On January 25, 1982, Bill Davidson and Robert Derby, senior officers of Defendant corporation, met with Plaintiff and informed him that he was relieved of his position of employment with Defendant.

III

During the period of Plaintiff's employment, Defendant represented to Plaintiff that he would be treated fairly and equitably in all facets of the employment relation, and especially in the event of the termination of his employment. Defendant further represented that it would comply with published policies and procedures in the event of termination of Plaintiff's employment. Finally, Defendant or its officers represented to Plaintiff at the January 25th meeting that his employment was not then

terminated and that Defendant would attempt to relocate him in another position within Defendant corporation or with an affiliated corporation. Defendant intended Plaintiff to rely on these representations.

IV

These representations were false in that Defendant did not, and did not intend to, comply with its published policies and procedures and did not intend to treat Plaintiff equitably and fairly in terminating his employment; in that Defendant did not, and did not intend to, follow its published procedures and policies in effecting his dismissal and did intend to rely on 12 U.S.C., Section 24 (Fifth) which it alleges allows Plaintiff to be dismissed at will; in that Plaintiff's employment was in fact terminated at the January 25th meeting. The termination was irrevocable, and Defendant did not, and did not intend to, relocate or reinstate Plaintiff, nor did it intend to follow its manual with reference to the Plaintiff after he became an officer, and Defendant at the time it induced Plaintiff to become an officer and published its personnel manual and intended to, and did, assert U.S.C. Section 24 (Fifth) and had no intention of being bound, despite its assertions that it applied to all its employees when it published its manual, officers and non-officers alike.

V

Plaintiff was at all times material unaware that Defendant did not intend to treat him in accordance with its published policy manual or to treat him equitably and fairly in effecting his dismissal, that Defendant did not

intend to follow its procedures and policies for effecting his dismissal, nor that the Defendant did intend to rely on 12 U.S.C. Section 24 (Fifth), when his employment was terminated at the January 25th meeting, and that Defendant did not intend to relocate or reinstate him.

VI

As a result of the conduct of Defendant and its officers, Plaintiff, by virtue of his reliance on the truthfulness of Defendant's representations, has suffered financial losses and expenses. The losses include lost wages while seeking replacement employment, lost future income in obtaining less remunerative replacement employment, and depletion of his savings. The expenses include the costs of locating and obtaining replacement employment, commuting to the location of the replacement employment, maintaining a separate residence there, and borrowing funds. These losses and expenses total $868,000.

VII

As a result of Defendant and its officers before his termination and subsequent thereto, Plaintiff has suffered severe emotional distress, including shock, disappointment, humiliation, anxiety and worry. Plaintiff has also suffered losses of self-esteem and self-confidence, as well as damage to his reputation.

VIII

By virtue of his reliance upon the truthfulness of Defendant's representations, Plaintiff has been generally damaged in the amount of $1,500,000.

IX

Defendant and its officers made the representations maliciously, wilfully or recklessly, in complete disregard for the predictable detrimental consequences for Plaintiff in the event of his reliance. Therefore, Plaintiff is entitled to the sum of $1,500,000 in punitive damages.

WHEREFORE, Plaintiff demands judgment:

1. In favor of Plaintiff in the amount of $868,000 in special damages, $1,404,000 in general damages and $1,500,000 in punitive damages on the first claim for relief;

2. In favor of Plaintiff in the amount of $868,000 in special damages, $1,404,000 in general damages and $1,500,000 in punitive damages on the second claim for relief;

3. In favor of Plaintiff in the amount of $1,500,000 in general damages and $1,500,000 in punitive damages on the third claim for relief;

4. In favor of Plaintiff in the amount of $868,000 in special damages, $1,500,000 in general damages and $1,500,000 in punitive damages on the fourth claim for relief;

5. For Plaintiff's costs and disbursements incurred herein;

6. For such other and further relief as the court may deem just and equitable.

LUVAAS, COBB, RICHARDS & FRASER, P.C.
Attorneys for Plaintiff

By: _____
ROBERT H. FRASER
OSB NO. 59033

* * *

I certify that the foregoing First Amended and Supplemental Complaint, is a true, exact and complete copy of the original.

DATED: May 20, 1983 /s/ Robert H. Fraser

One of Attorneys for Plaintiff

* * *

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EXHIBIT B

CIRCUIT COURT FOR LANE COUNTY
Second Judicial District

TO: Balmer Thomas A -ot
222 Sw Columbia Street
Portland Or 97201

In accordance with ORCP 70B(1) you are hereby notified that judgment was entered in the case noted below.

MCWHORTER ROBERT P/FIRST INTERSTATE BANK OF OR NA

| | |
|---|---|
| CASE NO.: | 168301030 |
| DATE FILED: | 04/27/87 |
| DATE ENTERED: | 04/27/87 |
| JUDGE: | Maurice K. Merten |

# APPENDIX N

## Statutes and Civil Rules

## 15 U.S.C. Sec. 1

### § 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any

combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

28 U.S.C. Sec. 1254

**§ 1254. Courts of appeals; certiorari; appeal; certified questions**

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

18 U.S.C. Sec. 1961

**§ 1961. Definitions**

As used in this chapter –

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664

(relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1029 (relative to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251-2252 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing

with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transaction Reporting Act;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal

law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State of Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United State, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

## FEDERAL RULES OF CIVIL PROCEDURE

### Rule 56. Summary Judgment

**(a) For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

**(b) For Defending Party.** A party against whom a claim, counterclaim or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

**(c) Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

**(d) Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the

whole case or for all the relief asked and a trial is necessary, the court at the hearings of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

**(e) Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

**(f) When Affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

**(g) Affidavits Made in Bad Faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(as amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987.)